



# 2020 Compliance Workshop

## Digital Goods: How States Define, Tax and/or Exempt

*Prepared for Federation of Tax Administrators Workshop*

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# Disclaimers

- 1. *The information and findings contained in this presentation are from the academic or observation-only perspective, and do not constitute legal advice or official guidance from the Arizona Department of Revenue or any other agency.***
- 2. *The laws are rapidly changing or undergoing revisions and clarifications by courts and regulatory agencies.***
  - a) All legal conclusions must be verified by referencing to appropriate and updated sources of law and guidance applicable at the time of any specific transaction.*
  - b) Consultation with a legal or accounting professional is strongly recommended before any real-life implementation of a decision to collect or not any applicable tax in all applicable jurisdictions (to include both state and local taxes).*
- 3. *This PowerPoint collects observations regarding Taxability of Digital Goods and Services in each state, including a summary-table from Walter Hellerstein, State Taxation, 2019 Cumulative Supp. It is intended to start a discussion, not deliver ready solutions.***



# Headlines

- “DOR Says Digital Taxation Bill Will Cost Arizona Millions” (Mar. 2019, AZ)
- “Netflix, ADP and GoDaddy are Battling Arizona DOR” (Apr. 2019, AZ)
- “California: how to best tax streaming services” (Mar. 2018, CA)
- “Did you get an email about Spotify subscriptions increasing for Connecticut residents? That’s not the only service you’ll be paying more for starting Oct. 1” (Sep. 2019, CT)
- “Now Georgia Is Pursuing a “Netflix Tax” to Cash in on Digital Streaming. Is It Time to Worry?” (Jan. 2019, GA) “Netflix exempted from Proposed Georgia Downloads Tax” (Feb. 25, 2019)
- “Wait, they can tax Netflix?” (Aug. 2017, KS)



# Headlines

- “‘Netflix Tax’ Proposed In Massachusetts” (Aug. 2019, MA)
- “Netflix Sent to State Court to Fight Missouri Cities on Fees” (Aug. 2019, MO)
- “Will New York Adopt a Netflix Tax?” (May 2019, NY)
- “North Carolina Clarifies Sales Tax on Digital Goods” (Aug. 2019)
- “Could North Dakotans one day pay a ‘Netflix Tax’?” (May 2019, ND)
- “R.I. eyes expanding sales tax to downloads, streaming services” (Nov. 2017, RI)
- “The Utah State Legislature is considering taxing your Netflix” (Nov. 2017, UT)





# To Tax or Not to Tax?



Brittany Hunter

**W**hen the private sector needs to generate more revenue, entrepreneurs innovate and create in order to draw in consumers and raise profits. When the government needs to generate additional revenue, they are left with only one option: Extort through fees and taxation. And after it has taxed everything feasibly within its grasp, it has to get creative.



Jeremy Duda

The Arizona Department of Revenue determined that legislation to exempt certain digital goods and services from sales taxes could cost the state at least \$33 million in 2020, an analysis that could help the bill's opponents keep it from moving forward in the Senate.

<https://fee.org/articles/now-georgia-is-pursuing-a-netflix-tax-to-cash-in-on-digital-streaming-is-it-time-to-worry/>

<https://www.azmirror.com/2019/03/19/departement-of-revenue-says-digital-taxation-bill-will-cost-arizona-millions/>



# Digital Goods: Netflix is a Service



## STATEMENT BY NETFLIX, INC. SALES TAX RULE 027

I am Diane Holman, Senior Sales Tax Manager for Netflix, Inc. Netflix thanks the Idaho State Tax Commission (the “Commission”) for this opportunity to comment on proposed draft Rule 027. Netflix submits this statement to assist the Commission both to understand Netflix’s video streaming service and to address properly video streaming in its Rule 027.

Netflix provides a video streaming *service* (“Streaming Service”) we believe is *not* subject to the Idaho Sales Tax. In proceedings before the Idaho Senate considering HB 598 (now adopted as Idaho Code § 63-3616), the Tax Policy Specialist for the Commission, Mr. McLean Russell, admitted as much when he testified that it was certainly debatable as to whether Netflix’ Streaming Service would be taxable even after the passage of HB 598. According to Mr. Russell, a statutory clarification was needed to end that debate.<sup>1</sup>

The legislature chose not to refine HB 598 to tax Streaming. Thus, the Commission lacks the authority to change that result and impose a tax on Streaming under the guise of Rule 027.

[https://tax.idaho.gov/pubs/rulesdoc\\_4jRyl4hQR9TnS.pdf](https://tax.idaho.gov/pubs/rulesdoc_4jRyl4hQR9TnS.pdf)



# Digital Goods: Netflix Makes A Statement It Provides a Service

1. Netflix “retains custody and control of its content and the entire Streaming process”
2. Subscribers pay a monthly subscription fee regardless of viewing any content
  - Subscribers acquire the right to view video content, access to the library, use of Netflix software allowing to search, and the benefit of unique interface...
3. The content is not downloadable but is streamed in real time.
4. Streaming is not software.
5. “When a tax agency recently tried to expand a tax statute by fiat arguing that streaming is or resembles the sale of tangible personal property, that effort failed. A Louisiana District Court last month held that transaction like video on demand and pay per view do not involve the sale or rental of tangible personal property but rather constitute the provisions of nontaxable service.” *Jefferson Parish v. Cox Comm.*, No. 706-766 (Jefferson Parish 24<sup>th</sup> Dist., June 11, 2014).



# Digital Goods: Netflix is Product



Department of  
Taxation

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## Frequently Asked Questions

The Ohio Department of Taxation has compiled a list of frequently asked questions covering many different categories.

### 1070. What is taxed under R.C. 5739.01(B)(12), "specified digital products" ?

Items, including but not limited to, audiovisual products (such as movies), audio products (such as songs), and books delivered electronically. Tax applies to both temporary and permanent transfer (i.e., need not purchase the product for ownership). Examples are Netflix, HULU, I-Tunes, e-books for Kindle and other electronic readers.

<https://www.tax.ohio.gov/faq/tabid/6315/QuestionID/2828/AFMID/11354/Default.aspx>



# Digital Goods: Netflix is Product



[www.revenue.pa.gov](http://www.revenue.pa.gov)

## Tax on Digital Products

### WHEN IS A TRANSFER OF DIGITAL MEDIA TAXABLE?

The sales and use tax applies to any transfer of a digital product where the purchaser pays a consideration, unless that transfer is otherwise exempt.

Common purchases of digital products that are taxable include, but are not limited to:

- **E-books** or a subscription to download e-books.
- **Digital video** that is downloaded or streamed or a subscription to a streaming service, such as Netflix or Hulu.
- **Digital audio** that is downloaded or streamed including songs, ringtones, and audio books from iTunes, Google Play and other services, as well as subscriptions to satellite radio and other streaming services.

[https://www.revenue.pa.gov/GeneralTaxInformation/Tax%20Types%20and%20Information/SUT/Documents/digital\\_products\\_tax\\_ga.pdf](https://www.revenue.pa.gov/GeneralTaxInformation/Tax%20Types%20and%20Information/SUT/Documents/digital_products_tax_ga.pdf)





# Digital Goods: Tax “if it would be taxable if sold in a tangible medium”

## North Carolina clarifies sales tax on digital goods

INSIGHT ARTICLE | August 05, 2019

On July 26, 2019, North Carolina Gov. Roy Cooper signed [Senate Bill 523](#), providing various clarifications and changes to the state's tax law including a broadening of the sales tax base to include certain digital property.

Currently, the sales and use tax is imposed on digital property if it is: 1) delivered or accessed electronically, 2) is not considered tangible personal property, and 3) would be taxable if sold in a tangible medium. For example, a digital music album would be subject to the sales tax if the consumer could also purchase a physical version of the product. However, this provision created confusion for digital property purchases where a tangible version did not exist, often leading to the interpretation that digital property without a tangible equivalent was not subject to the tax.

Senate Bill 523 clarifies that the sales and use tax is imposed on “certain digital property.” Certain digital property includes the following items that are 1) delivered or accessed electronically and 2) are not considered tangible personal property: audio works; audiovisual works; books, magazines, newspapers, newsletters, reports, or other publications; and photographs and greeting cards. Certain digital property does not include an information service. The prong related to considering whether the product would be taxable in a tangible medium was eliminated. The tax on certain digital property is effective Oct. 1, 2019.

<https://rsmus.com/what-we-do/services/tax/indirect-tax/sales-and-use-tax/north-carolina-clarifies-sales-tax-on-digital-goods.html>



# Class Actions?

***NuOrder Technologies LLC v. ADOR*, TX 2018-000662 from Plaintiff's disclosures:**

- **22 states treat SaaS as not subject to state tax**
  - AR, CA, FL, GA, ID, IL, IN, IA, KS, LA, MI, MO, NE, NV, NJ, NC, ND, OK, RI, TX, VA, WY
- **14 states treat SaaS as being subject to sales/use tax**
  - CO, CT, HI, MA, MS, NM, NY, PA, SC, SD, TN, UT, WA, WV, WI
- **One state holds the intent of the transaction determines if its taxable.**
  - OH
- **9 states “do not appear to have codified their stance, with most providing informal guidance that SaaS is not taxable, although this situation is fluid.”**
  - AL, AZ, KY, ME, MD, MN, VT, DC, \_\_
- **5 states - no sales tax**
  - NH, OR, MT, AK, DE





# Agenda

## Topic: Current State of the US States' Taxation of Digital Products and Services

### 1. Types of Digital Goods

- a) A General Overview – Wikipedia, Internet and Common sense
- b) Digital Goods' Classification pursuant to the SSUTA Inventory Approach
- c) Digital Goods and the States' Statutes and Administrative Regulations
- d) Digital Goods and the State Courts' Case Law

### 2. Discussion re: Tax Administration Issues

- a) Policy Issues and Audit Challenges

### 3. MTC insights – a trend toward expansion of sales tax base to include “digital products” and streaming – recent legislation:

- a) DC, IA, SD, MD, RI, AR, UT, IL, MA.
- b) [\*Citrix Sys. V. Comm'r Revenue\*](#), 2020 WL 563319 (Supr. Jud. Ct. Mass. Feb. 5, 2020)



# Digital Goods

- **Digital goods or e-goods are intangible goods that exist in digital form.**
  - Wikipedia article;
  - digital media, such as e-books, downloadable music, internet radio, internet television and streaming media;
  - fonts, logos, photos and graphics; digital subscriptions; online ads (as purchased by the advertiser);
  - internet coupons;
  - electronic tickets;
  - online casino tokens;
  - electronically traded financial instruments;
  - downloadable software (Digital Distribution) and mobile apps;
  - cloud-based applications and online games;
  - virtual goods used within the virtual economies of online games and communities;
  - workbooks; worksheets; planners; e-learning (online courses); webinars, video tutorials, blog posts; cards; patterns; website themes; templates.



If you pay to watch a webinar on your computer screen, you have bought a digital good.



# SSUTA Matrix: Limitations

	Reference Number	Computer related products
1	30100	<b>Computer</b>
2	30040	Prewritten computer software (PCS)
3	30050	PCS delivered electronically (DE)
4	30060	PCS delivered via load and leave (DVLL)
5	30015	Non-prewritten (custom) computer software (CCS)
6	30025	CCS DE
7	30035	CCS DVLL
		<b>Mandatory computer software maintenance contract (MCSMC)</b>
8	30200	MCSMC for PCS
9	30210	MCSMC for PCS DE
10	30220	MCSMC for PCS DVLL
11	30230	MCSMC for CCS
12	30240	MCSMC for CCS DE
13	30250	MCSMC for CCS DVLL
		<b>Optional computer software maintenance contract (OCSMC)</b>
14	30300	OCSMC for PCS (updates and upgrades)
15	30310	OCSMC for PCS DE (updates and upgrades)
16	30320	OCSMC for PCS DVLL (updates and upgrades)
17	30330	OCSMC for CCS (updates and upgrades)
18	30340	OCSMC for CCS DE (updates and upgrades)
19	30350	OCSMC for CCS DVLL (updates and upgrades)
20	30360	OCSMC for CCS (support only)
21	30370	OCSMC for CCS (updates and upgrades and support)
22	30380	OCSMC for CCS DE (updates and upgrades and support)
23	30390	OCSMC for CCS DVLL (updates and upgrades and support)

<https://sst.streamlinedsalestax.org/otm/>



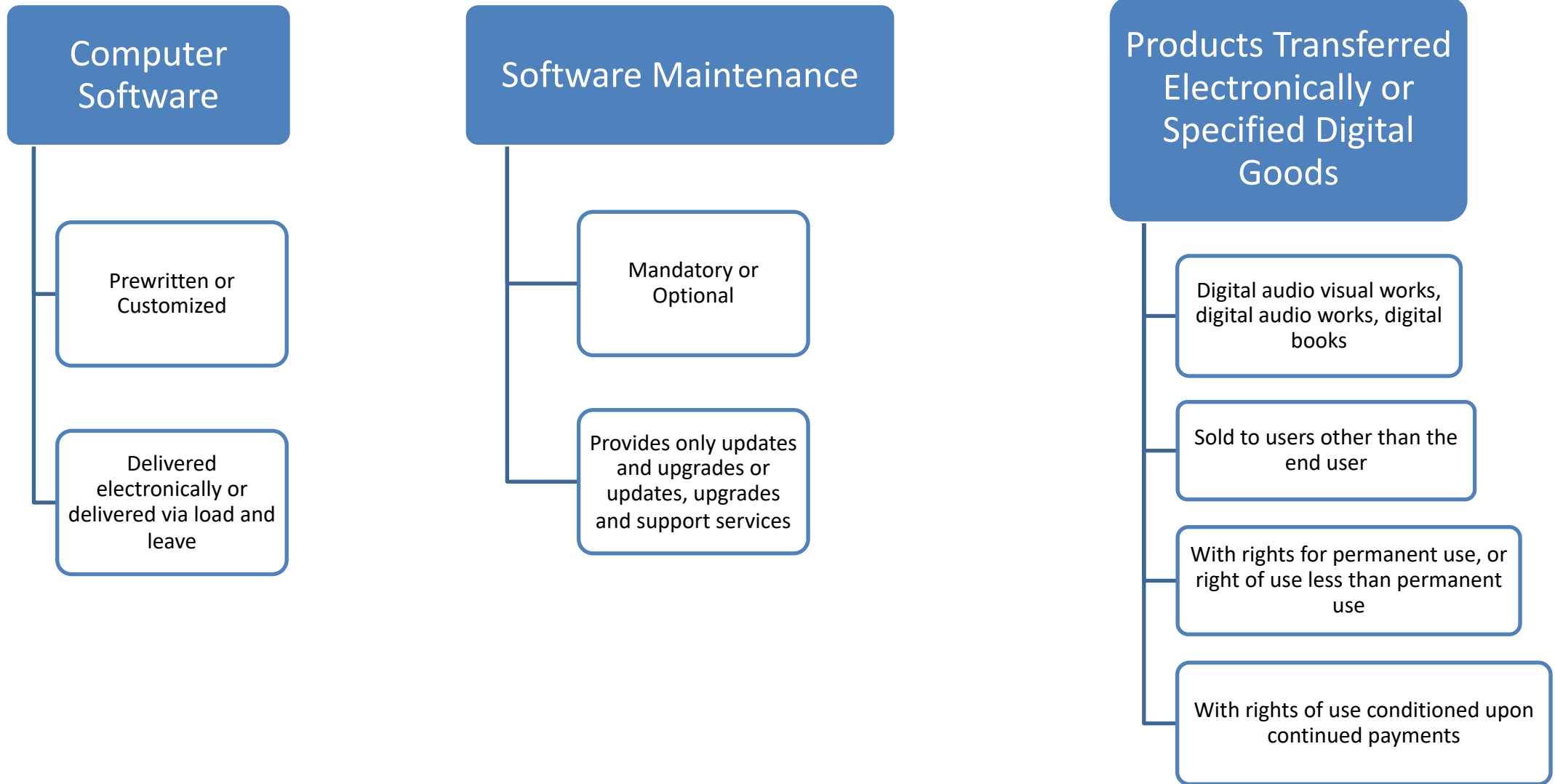
# SSUTA Matrix: Limitations

		Tax treatment for OCSMC with respect to PCS sold for one non-itemized price that include updates and upgrades and/or support services – use percentages in the taxable and exempt columns to denote tax treatment
24	30400	OCSMC for PCS to provide updates/upgrades and support services
25	30410	OCSMC for PCS to provide updates/upgrades delivered electronically and support services to the software
26	30420	OCSMC for PCS to provide updates/upgrades delivered via load and leave and support services to the software
27	30430	OCSM for PCS that only provide support services
		<b>Digital products (excludes telecommunications services, ancillary services and computer software)</b>
28	31000	A state imposing tax on products "transferred electronically" is not required to adopt definitions for specified digital products. ("Specified digital products" includes the defined terms: digital audio visual works; digital audio works; and digital books.) Does your state impose tax on products transferred electronically other than digital audio visual works, digital audio works, or digital books?
		<b>For transactions other than those included above, a state must specifically impose and separately enumerate a broader imposition of the tax. Does your state impose tax on:</b>
29	31065	Digital audio visual works (DAVW) sold to users other than the end user ("Not EU")
30	31050	DAVW sold with rights of use less than permanent use ("sold Not PU")
31	31060	DAVW sold with rights of use conditioned on continued payment ("sold CCP")
32	31095	Digital audio works (DAW) sold Not EU
33	31080	DAW sold Not PU
34	31090	DAW sold CCP
35	31125	Digital books (DB) sold Not EU
36	31110	DB sold Not PU
37	31120	DB sold CCP
38	31121	<b>Does your state treat subscriptions to products "transferred electronically" differently than a non-subscription purchase of such product</b>
39		Digital products(excludes telecommunications services, ancillary services and computer software)
40	31040	DAVW sold EU PU
41	31070	DAW sold EU PU
42	31100	DB sold EU PU
		<b>Section 332.H. provides that states may have product based exemptions for specific items within specified digital products.("Specified digital products" includes the defined terms: digital audio visual works; digital audio works; and digital books.)List product based exemptions for specific items included in specified digital products. Example: digital textbooks</b>
43	32000	

<https://sst.streamlinedsalestax.org/otm/>



# SSUTA: Computers and Digital Products



# SSUTA States

<b>Tax</b> software, digital product	<b>Some Tax</b> software, SaaS, not digital product	<b>Some Tax</b> not SaaS, digital product	<b>Limited Tax</b> E-delivered software, not SaaS, not digital product	<b>No Tax</b> tangible media, not SaaS, not digital product
<b>Iowa</b>	<b>West Virginia</b>	Arkansas	Kansas	Georgia
<b>Nebraska</b>		Indiana	Michigan	Nevada
Ohio		Kentucky	North Dakota	Oklahoma
Rhode Island		Minnesota		
South Dakota		New Jersey		
<b>Tennessee</b>		North Carolina		
Utah		Vermont		
Washington		Wisconsin		
		Wyoming		



# Digital Goods: South Dakota Framework



Tangible Personal Property = Products  
Transferred Electronically

Temporary or  
permanent use

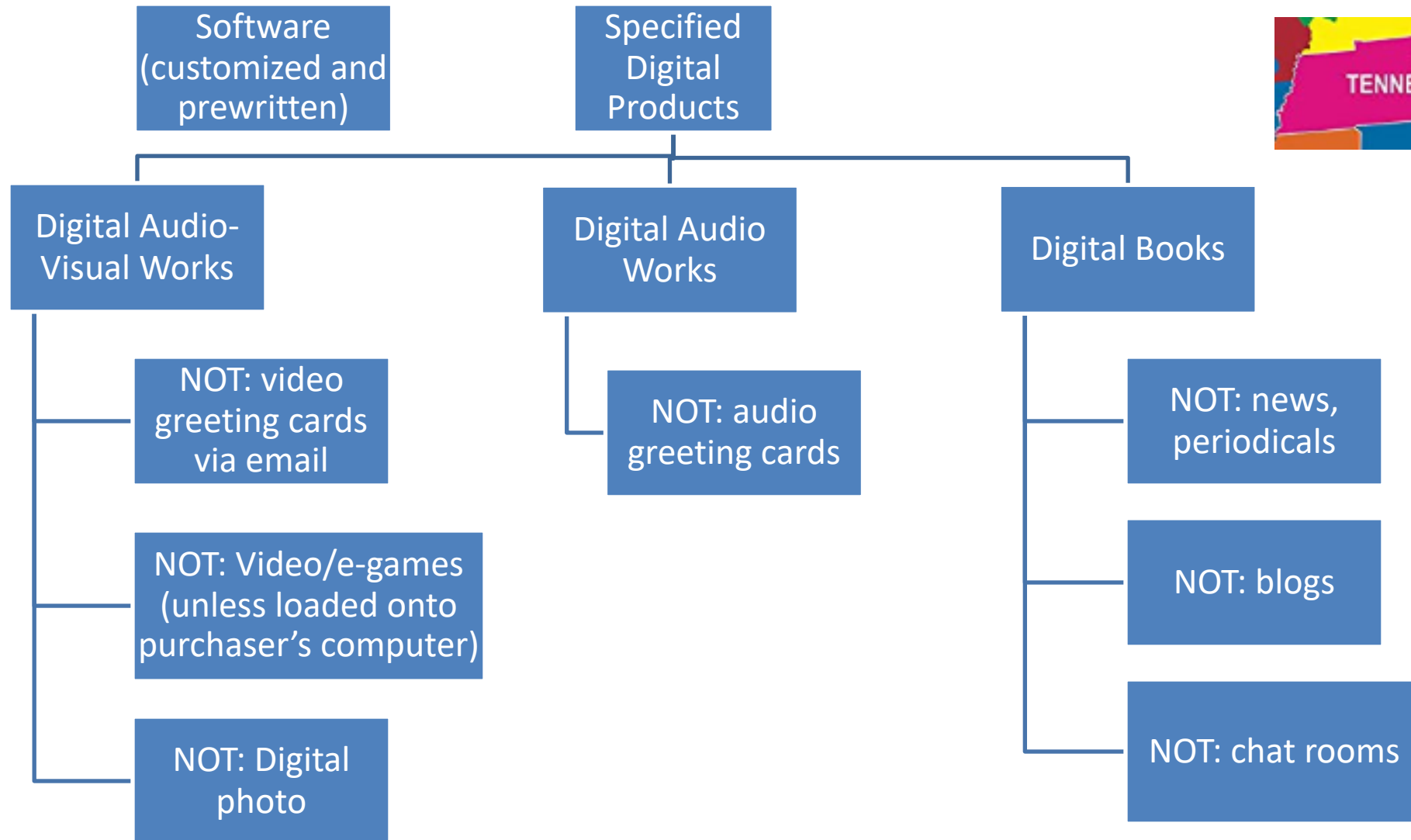
“product obtained by means  
other than tangible storage”

Examples: Music, Books,  
Videos, Movies,  
Newspapers, Customer  
computer software,  
Photos, clip art, etc.





# Digital Goods: Tennessee Framework



# Digital Goods: Texas Framework

Computer  
Programs

Taxable Services

Other Taxable  
Services

Nontaxable  
Services Examples

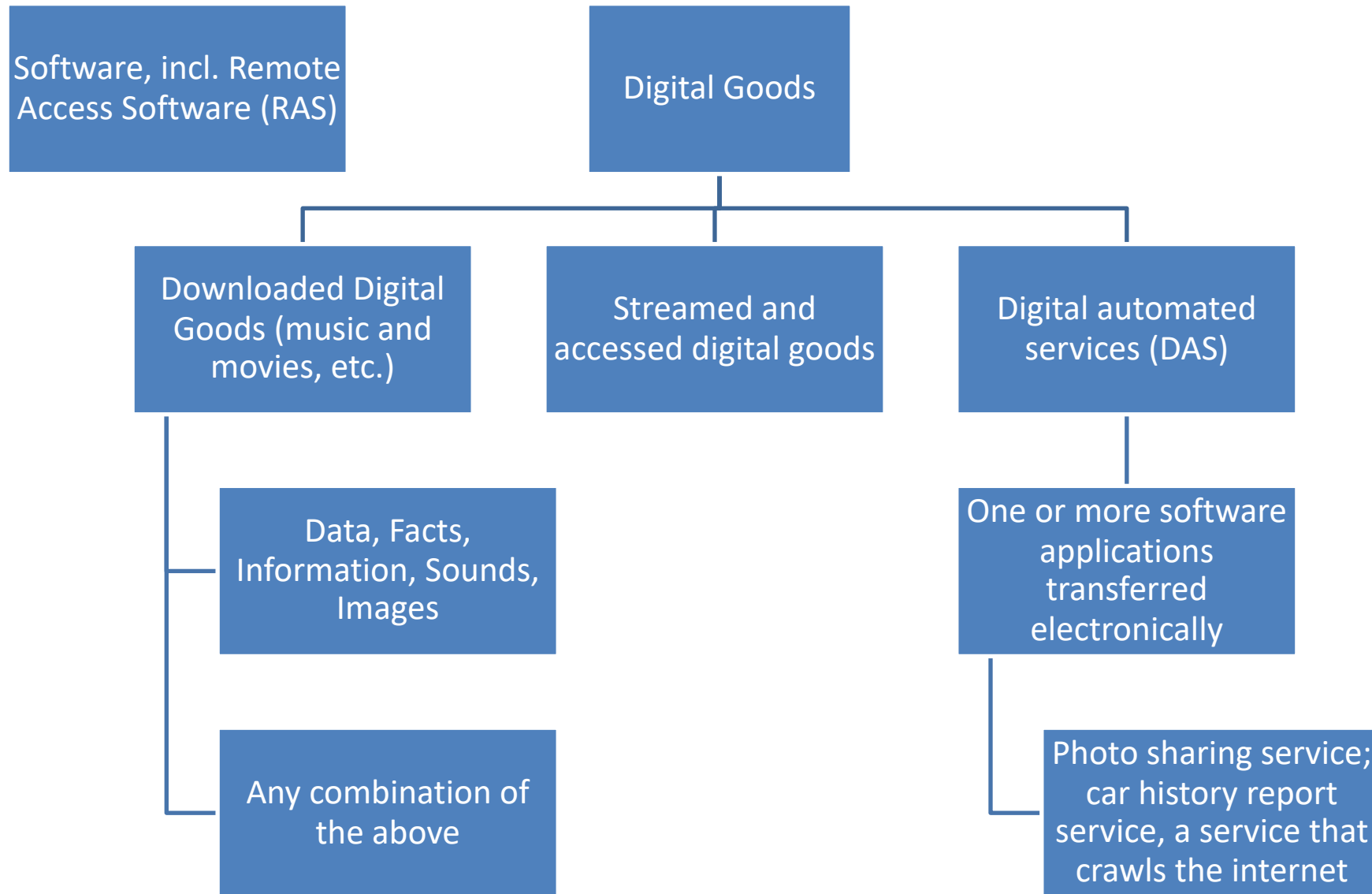
Data Processing: Accounts payable, accounts receivable billing; Check preparation; Computer aided drafting; Data; Editing/entering client's' data; Internet services: web pages; data storage

Information; Credit reporting/debt collection; Security; Telecommunications

Auditing, consulting, developing specifications for designs, forecasting, interpreting client's data, preparing documents, financial statements, etc.



# Digital Goods: Washington Framework



# Digital Goods: Washington Framework



What is Not Digital  
Automated  
Services?

Internet  
access

Payment  
process

Data  
processing  
services

Tele-  
communica  
tions

Live  
interactive  
present.

Advert.  
services

Web  
hosting,  
storage



# Digital Goods: Wisconsin Framework



Prewritten  
computer  
Software

Digital Goods  
(transferred  
electronically)

Specified Digital Goods

Additional Digital Goods

Digital audio works

Digital audiovisual works

Digital books

Digital code

Greeting cards

Finished artwork

Periodicals

Video/e-games

News

Digital code



# Digital Goods: Wisconsin Framework

Prewritten Computer Software  
(delivered electronically)

Digital Goods  
(transferred electronically)

## “Transferred Electronically”

A digital good is characterized by the fact that it is transferred electronically to the purchaser. Section 77.51(21q), Wis. Stats., provides that:

“ ‘Transferred electronically’ means accessed or obtained by the purchaser by means other than tangible storage media.”

Typical means of transferring a digital good electronically to a purchaser include uploading the digital good using the Internet, streaming the digital good over the Internet, and emailing the digital good to the purchaser.

A digital good is transferred electronically regardless of whether the purchaser is allowed to make or retain a copy of the digital good.

**Caution:** “Transferred electronically” is a term that applies to digital goods. “Delivered electronically” is a term that applies to prewritten computer software. Prewritten computer software delivered electronically is tangible personal property and not a digital good for purposes of Wisconsin’s sales and use tax laws.



## Observations re: Variety of Approaches

- There is no uniform definition of the term “tangible personal property.”
- Most states, thirty-three (33) states, have the definition of “tangible personal property” as “*property that may be seen, weighed, measured, felt, or touched, or is in any other manner perceptible to the senses.*”
- Twenty-eight (28) states have the definition of “tangible personal property” that specifically refers to “*prewritten computer software.*”





# Observations re: Variety of Approaches

- **Based on various types of software and methods of receiving it, the states can be split into**
  - (a) states taxing only software sold along with some tangible medium like a CD
  - (b) states taxing all software, expressly including taxing software as a service (SaaS) or software accessed electronically, i.e., hosted by a vendor;
  - (c) states taxing software delivered electronically but uncertain or not address whether they intended to tax SaaS or remotely hosted software
  - (d) states taxing software delivered electronically and expressly excluding/clarifying that SaaS or remotely hosted software is not taxable
  - (d) states taxing both canned and customer software.



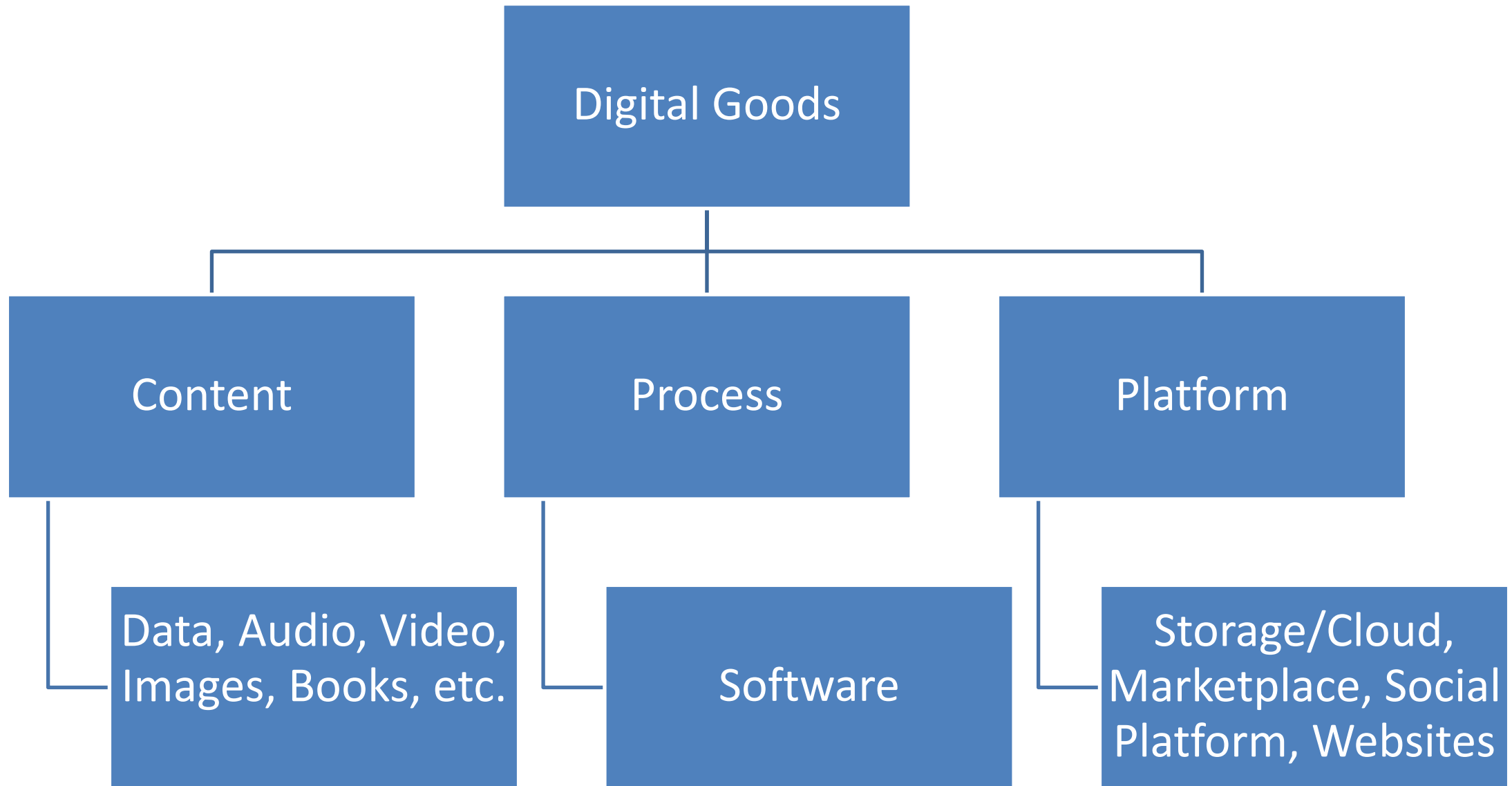
# Video Programming

**At least eighteen (19) states expressly tax video programming, broadcasting, cable or television services.**

- *Arkansas, Connecticut, Florida, Hawaii, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Minnesota, Nebraska, Pennsylvania, South Dakota, Tennessee, Texas, Washington, District of Columbia) or pay per view (Maryland, Washington).*



# Digital Goods



# Digital Goods

For Tax	Against Tax
1) Need to broaden tax base to prevent losses of revenue due to expansion of digital economy, e.g., customers using broadband Internet and not cable.	1) The revenue is not lost but is rather growing because of the Internet activities.
2) Rural areas do not have access to the Internet services and need to raise taxes to build that infrastructure.	2) The tax will open a gateway to taxing Internet access.
3) Digital services are replacing jobs and reducing income tax base.	3) 7,400 various jurisdictions – too complex/burdensome.



# Digital Goods: Audit Strategy for the Industry

## **“How to Defend a Remote Access to Software Sales Tax Audit” by Leah Robinson and Samuel Fowler**

1. Provide a highly technical description of your services.
2. Emphasize the aspects of your service that could not have come in a shrink-wrapped box (human element or access to proprietary, ever-changing data sources)
3. Demonstrate that the primary purpose of your service is something other than a software license and is itself nontaxable.



# Digital Goods: Audit Strategy for Auditors

1. Understand the nature of the product and/or services.
  - a. If bundled, can the product be separate from services (offered optionally, etc.).
  - b. What are the direct costs for the product or service (is the value determined based on labor costs or material costs)
2. Gather evidence of how the product and/or services are invoiced.
3. Ensure you have established the location of where the product and/or service is received and used.



# Digital Goods: Audit Strategy for Auditors

Application of the “true object,” “dominant purpose”, or “essence of the transaction” tests to an inseparably mixed transaction =

**- whether the transaction is more analogous to the purchase of a service or intangible right, OR a sale of goods?**

Factors:

1. Compare the value of tangible v. intangible property/service.
2. Consider:
  - a) if there is an alternative method of transfer.
  - b) the length of time the information retains its value.
3. Consider if the buyer’s ability to use the tangible property is constrained, or if the buyer acquire the right to publish.
4. Consider what is done with the tangible property in the end.
  - a) Consider whether the tangible property is a finished product.
5. Consider whether the buyer is looking for a special skill/expertise.



*City of Boulder v. Leanin’ Tree, Inc.. 72 P.3d 361 (Colo. 2003)*





# What's Next?

## Elon Musk unveils Neuralink's plans for brain-reading 'threads' and a robot to insert them

*Not for humans yet*

By Elizabeth Lopatto | @mslopatto | Jul 16, 2019, 11:24pm EDT

During a Q&A at the end of the presentation, Musk revealed results that the rest of the team hadn't realized he would: "A monkey has been able to control a computer with its brain."



Elon Musk said the main reason for the presentation was for Neuralink recruiting. | Photo by Elizabeth Lopatto / The Verge



The proposed future technology Neuralink intends to make, a module that sits outside the head and wirelessly receives information from threads embedded in the brain. | Photo: Neuralink

Elon Musk's Neuralink, the secretive company developing brain-machine interfaces, showed off some of the technology it has been developing to the public for the first time. The goal is to eventually begin implanting devices in paralyzed humans, allowing them to control phones or computers.

<https://www.theverge.com/2019/7/16/20697123/elon-musk-neuralink-brain-reading-thread-robot>

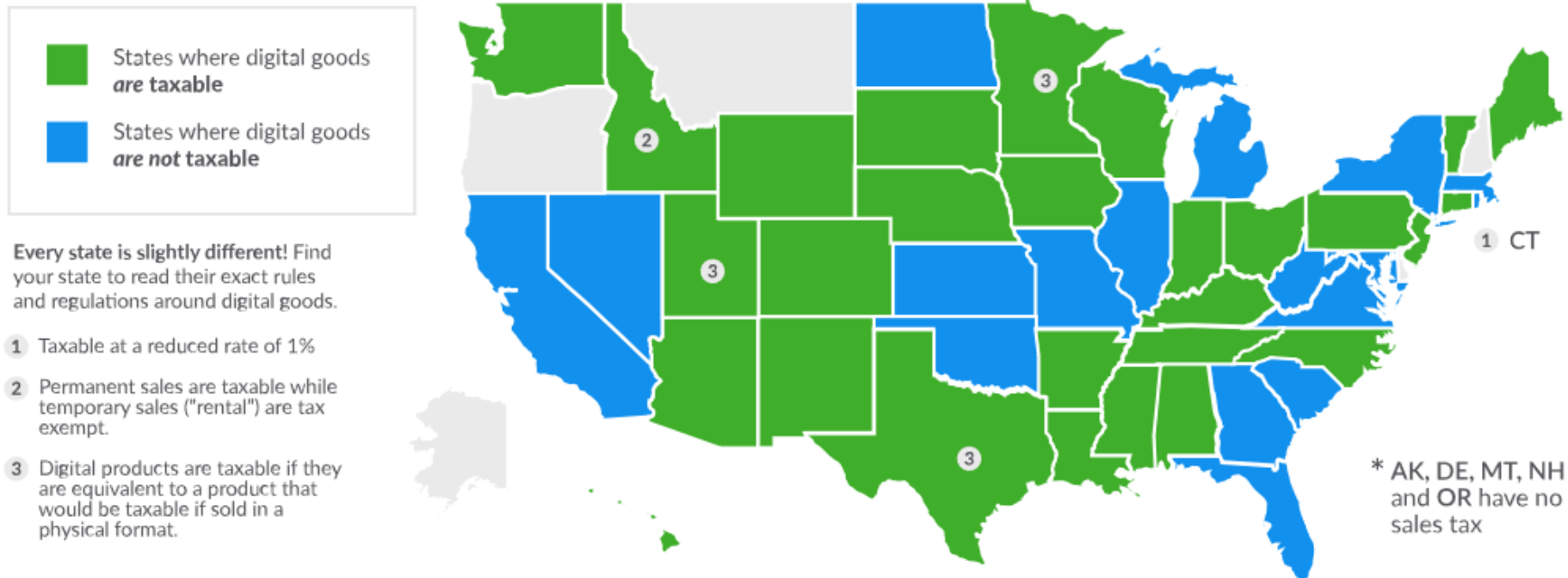




# TaxJar, by Jennifer Dunn

## Sales Tax by State: Where are Digital Products Taxable?

Should you charge sales tax on digital books, movies or music?



*Last updated July 2, 2019*



<https://blog.taxjar.com/sales-tax-digital-products/>

Tax no statute	Tax software, digital product	Some Tax software, SaaS, not digital product	Some Tax software, not SaaS, digital product	Limited Tax software, not SaaS, not digital product	No Tax software tangible media, not SaaS, not digital product
<a href="#">Alabama</a>	<a href="#">Connecticut</a>	<a href="#">Massachusetts</a> (SaaS)	<a href="#">Arkansas</a> (tang. soft.) *	<a href="#">Illinois</a> (perm) (SaaS-?)	<a href="#">California</a>
<a href="#">Arizona</a>	<a href="#">District of Columbia</a>	<a href="#">New York</a> (SaaS)	<a href="#">Colorado</a> (tang. soft.)	<a href="#">Kansas</a> (?) *	<a href="#">Georgia</a> *
<a href="#">Hawaii</a>	<a href="#">Iowa</a> *	<a href="#">West Virginia</a> *	<a href="#">Florida</a>	<a href="#">Michigan</a> *	<a href="#">Maryland</a>
<a href="#">New Mexico</a>	<a href="#">Nebraska</a> *		<a href="#">Idaho</a> (perm)	<a href="#">North Dakota</a> *	<a href="#">Missouri</a>
	<a href="#">Ohio</a> (SaaS/pub -?) *		<a href="#">Indiana</a> * (perm)		<a href="#">Nevada</a> *
	<a href="#">Pennsylvania</a>		<a href="#">Kentucky</a> (SaaS-?) *		<a href="#">Oklahoma</a> *
	<a href="#">Rhode Island</a> *		<a href="#">Louisiana</a> (SaaS-?)		<a href="#">Virginia</a> (?)
	<a href="#">South Carolina</a>		<a href="#">Maine</a> (SaaS-?)		
	<a href="#">South Dakota</a> *		<a href="#">Minnesota</a> *		
	<a href="#">Tennessee</a> *		<a href="#">Mississippi</a>		
	<a href="#">Texas</a>		<a href="#">New Jersey</a> *		
	<a href="#">Utah</a> *		<a href="#">North Carolina</a> *		
	<a href="#">Washington</a> *		<a href="#">Vermont</a> *		<b><a href="#">Bold = custom and canned software taxable</a></b>
			<a href="#">Wisconsin</a> *		* = SSUTA
			<a href="#">Wyoming</a> (perm) (matrix) *		



# Examples of Education Guidance by Tax Authorities

Notices: [AL](#), [AR](#), [DC](#), [IA](#), [MI](#), [NC](#), [RI](#)

Bulletins: [CT](#), [DC](#), [FL](#), [IN](#), [KS](#), [MA](#), [ME](#), [MD](#), [MN](#), [NE](#), [NV](#), [NJ](#), [NY](#), [NC](#), [ND](#), [OH](#), [PA](#), [SD](#), [TN](#), [TX](#), [UT](#), [VT](#), [WA](#), [WI](#)

Rulings/Rules: [AZ](#), [CA](#), [GA](#), [LA](#), [MA](#), [MO](#), [MS](#), [NE](#), [NV](#), [OK](#), [SC](#), [VA](#)



# Common Trends and Points for Discussion

1. [SSUTA Matrix](https://sst.streamlinedsalestax.org/otm/): Limitations (<https://sst.streamlinedsalestax.org/otm/>)
2. Basis for Taxation: Statutes; Rules; Case Law; Bulletins - [Premier](#) (NJ)
3. Digital products/services: “professional services” v. “automated services” - [Gartner](#) (WA), [Lucent](#) (CA), [IBM](#) (MO)
  - Prewritten software or customized software ([Alabama/Admin. Rule](#)); [Russell](#) (AL – config.), [Verizon](#) (TX – improvements), [North](#) (TX – general use), [Nortel](#) (CA – labor hours),
4. Level of control needed for taxability – what is “delivered electronically”
  - i. *ownership-type use (control over code)*: [Auto-Owners](#) (MI), [Navistar](#) (CA); [Equitable](#) (MD)
  - ii. *transferred electronically* – [Ball Aerospace](#) (CO), [Citizens](#) (SC)
  - iii. *accessed electronically /furnished electronically*
  - iv. *Permanent use v. “less than permanent use”* – [South Central Tele \(UT\)](#)
5. Mixed or bundled: burden of proof issues – [Lumidata](#) (MN), [Dell](#) (CA), RI
6. Cable and communications – [Normand](#) (LA), [Level 3](#) (PA), [AT&T](#) (KS)





# Alabama

Effective 2020, Alabama amended its Rules, [ADC 810-6-1-.37](#) (Computer hardware/software).

- Removed the distinction between “canned” and “custom” software.
  - Rental or licensing of software is treated as retail.
- The “form of transmission” of software does not alter taxability.
  - Still not clear if accessing software via cloud computing constitutes transmission.
- No mention as to digital goods – no certainty/no guidance.

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
AL	<del>Non-taxable.</del>	Taxable.	Taxable.	There is no guidance issued on SaaS.	Taxable. “Sales” of “tangible personal property” are generally presumed taxable, unless specifically exempted from taxation. “TPP” is property that can be seen, weighed, measured, felt, touched, or in any other manner perceived by the senses. Presumably digital products are treated as TPP and are therefore subject to tax.	Not taxable. The signal transmitted by cable and satellite tv is not tangible personal property.


- [Russell County Comm’ty Hosp. LLC v. DOR, 2018 WL 6010567 \(Ala. Civ. App. 2018\)](#) (tax authority wins, configuration is not customization/modification esp. when not separately invoiced).
- [State v. Central Computer Services, 349 So. 2d 1160 \(Ala. 1977\)](#) (taxpayer wins, software – information), overruled by Wal-Mart Stores, Inc. v. City of Mobile (Nov. 27, 1996).





## ALABAMA DEPARTMENT OF REVENUE

SERVICES

 June 19, 2019

MONTGOMERY, June 19, 2019– The Alabama Supreme Court recently upheld a lower court decision finding that a series of transactions involving the sale of computer software and related equipment was subject to sales tax. The case, *Ex parte Russell County Community Hospital, LLC*, Case No. 1180204, was decided on May 17, 2019. In reaching its decision, the Court examined the taxability of the conveyance of computer software versus the taxability of programming and other services that may accompany the conveyance.

After reviewing the existing law addressing the taxability of computer software, the Court concluded that the software transactions at issue in the case were taxable. The Court's decision is consistent with the department's long-stated administrative stance that software transactions are taxable, but separately stated or invoiced services that may attend the conveyance of software are not subject to the state's sales or use tax levies.

The department is undertaking a review of its related administrative rules, which will be updated to ensure that the terminology used to demonstrate this distinction is consistent with that used by the Court in the *Ex parte Russell County* decision.



# Alabama

- [Annual Report](#)
- Sales revenue (in billion): \$2.7
- Population (in million): 4.887
- Per capita sales tax: 552
- Montgomery
- Republican
- Audemus jura nostra defendere (We dare defend our rights)

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SaaS?

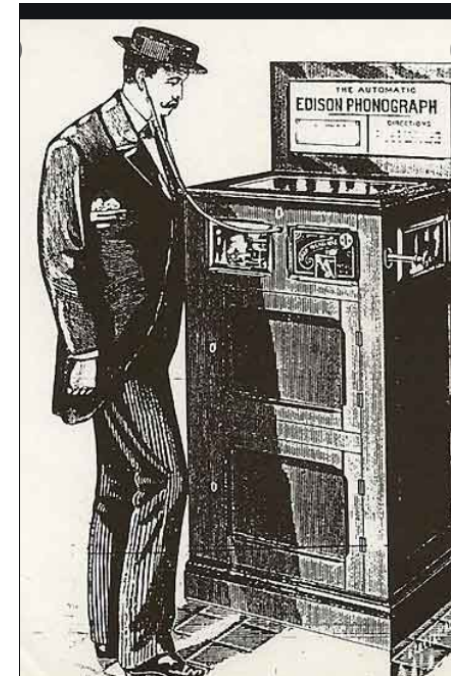
Digital goods?



# Arizona

- Arizona derives its authority from the broad definition of “tangible personal property” as interpreted by the Arizona Supreme Court *State v. Jones*, 137 P.2d 970 (Ariz. 1943) to include “sound.”

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
AZ	Exempt.	Taxable.	Taxable.	Taxable.	Taxable.	Not taxable. However, local taxes may apply.



# Arizona

*State v. Jones*, 137 P.2d 970 (Ariz. 1943)

- Facts: A phonograph machine.
  - The customer inserts a coin in the slot, presses a button indicating the particular record desired and the machine plays it.
- Issue: Does placing a coin in the slot and the playing of the record make it a taxable sale of tangible personal property?
- Law: The term “tangible personal property” means personal property which may be seen, weighed, measured, felt, touched, or is in any other manner perceptible to the senses.
  - If the machine were one in which a coin were inserted and the customer received in return a package of candy, gum or other article of merchandise, there would be no question but that the transaction would constitute a sale of tangible personal property. But is it a sale of tangible personal property when all the customer secures for his money is the pleasure of hearing the phonograph play a record?
- Holding: The playing of the record is perceptible to the sense of hearing and, hence, constitutes what the statute terms tangible personal property. The statute could not have made the playing of a record, in response to the coin placed in the slot, a sale of tangible personal property any more effective if it had made a special provision covering the situation.



# Arizona

- Ruling: [TPR 93-48](#)
- Private Letter Rulings: <https://azdor.gov/legal-research>

<a href="#">Rulings</a>	Transaction Privilege and Use Taxes	<a href="#">TPR 93-48</a>	Taxation of Computer Hardware, Software and Related Services	01/03/1994
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DOCUMENT TYPE	CATEGORY	DOCUMENT ID	DESCRIPTION	TAGS	DECISION DATE
<a href="#">Letter Rulings</a>	Transaction Privilege and Use Taxes	<a href="#">LR17-001</a>	Software	Personal Property Rental	01/03/2018
<a href="#">Letter Rulings</a>	Transaction Privilege and Use Taxes	<a href="#">LR16-011</a>	Software	Personal Property Rental	09/23/2016
<a href="#">Letter Rulings</a>	Transaction Privilege and Use Taxes	<a href="#">LR15-005</a>	Software	Personal Property Rental	05/15/2015
<a href="#">Letter Rulings</a>	Transaction Privilege and Use Taxes	<a href="#">LR15-001</a>	Software	Personal Property Rental	02/24/2015
<a href="#">Letter Rulings</a>	Transaction Privilege and Use Taxes	<a href="#">LR13-005</a>	Lease of Software; Solution	Personal Property Rental	04/29/2013
<a href="#">Letter Rulings</a>	Transaction Privilege and Use Taxes	<a href="#">LR11-010</a>	Software	Personal Property Rental	06/22/2011
<a href="#">Letter Rulings</a>	Transaction Privilege and Use Taxes	<a href="#">LR11-011</a>	Software	Personal Property Rental	06/22/2011
<a href="#">Letter Rulings</a>	Transaction Privilege and Use Taxes	<a href="#">LR11-005</a>	Custom/Canned Software	Personal Property Rental	04/19/2011
<a href="#">Letter Rulings</a>	Transaction Privilege and Use Taxes	<a href="#">LR10-007</a>	Lease of Software	Personal Property Rental	03/24/2010
<a href="#">Letter Rulings</a>	Transaction Privilege and Use Taxes	<a href="#">LR09-007</a>	Lease of software	Personal Property Rental	12/02/2009
<a href="#">Letter Rulings</a>	Transaction Privilege and Use Taxes	<a href="#">LR09-001</a>	Sale or Lease of Software/Software Maintenance	Personal Property Rental	02/03/2009
<a href="#">Letter Rulings</a>	Transaction Privilege and Use Taxes	<a href="#">LR07-004</a>	Software & Services	Retail	05/07/2007
<a href="#">Letter Rulings</a>	Transaction Privilege and Use Taxes	<a href="#">LR06-004</a>	Computer Software / Hardware Services	Retail	06/28/2006

<a href="#">Letter Rulings</a>	Transaction Privilege and Use Taxes	<a href="#">LR06-004</a>	Computer Software / Hardware Services	Retail	06/28/2006
<a href="#">Letter Rulings</a>	Transaction Privilege and Use Taxes	<a href="#">LR05-008</a>	Computer Software	Retail	09/08/2005
<a href="#">Letter Rulings</a>	Transaction Privilege and Use Taxes	<a href="#">LR04-010</a>	Lease of Software for Use In-State	Personal Property Rental	11/15/2004
<a href="#">Letter Rulings</a>	Transaction Privilege and Use Taxes	<a href="#">LR04-007</a>	Lease of Software for Use Out-of-State	Personal Property Rental	08/31/2004
<a href="#">Letter Rulings</a>	Transaction Privilege and Use Taxes	<a href="#">LR02-020</a>	Computer Software/Data Processing Service Agreements	Retail	11/05/2002
<a href="#">Letter Rulings</a>	Transaction Privilege and Use Taxes	<a href="#">LR95-010</a>	Computer Software	Retail	10/12/1995
<a href="#">Letter Rulings</a>	Use & Luxury	<a href="#">LR16-012</a>	Software	Purchaser Liability	12/05/2016
<a href="#">Letter Rulings</a>	Use & Luxury	<a href="#">LR09-001</a>	Sale or Lease of Software/Software Maintenance	Purchaser Liability	02/03/2009



# Arizona

- [Annual Report](#)
- **Sales revenue (in billion):** **\$6.56**
- **Population (in million):** **7.171**
- **Per capita sales tax:** **915**
- Phoenix
- Republican
- Ditat Deus (God enriches)
- *Jones* case provides a very broad interpretation of “tangible personal property,” with focus on the value, even if sound, as taxable (not method of delivery).



# Arkansas (SSUTA)

- Arkansas's definition of tangible personal property does not include specified digital goods but it includes prewritten computer software.
  - The term computer software “does not include software that is delivered electronically or by load and leave.”
  - The term “delivered electronically” means delivered to the purchaser by means other than tangible storage media. AR ST 26-53-109(1)(B)(ii).
- Arkansas' website currently does not provide any specific guidance as to taxability of its digital goods.
- It mentions that Arkansas passed Act 141 in 2017 to add “specified digital products.”  
<https://www.dfa.arkansas.gov/images/uploads/exciseTaxOffice/CandySoftDrinkDigitalProducts.pdf>
  - Specified digital goods are taxed whether the seller gives the permanent use or less than permanent use. A.C.A § 26-52-301.
- Streaming is specifically taxed as the service of cable televisions, etc. A.C.A. § 26-52-01(C)(i).

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
AR	Exempt.	Exempt. The term “computer software” does not include software that is delivered electronically or by load and leave; therefore, the sale of software delivered electronically rather than on a CD, a flash drive... is not subject to tax.	Taxable unless downloaded.	There is no guidance issued on SaaS. (?) However, sales of leases of services are exempt unless specifically designated by law as taxable, and SaaS is not specified as taxable. Also, the sale or licensing of software downloaded through electronic means is not subject to tax provided that the licensing charges are stated separately from charges for disks, CDs, or other tangible property.	<del>Exempt.</del> —Digital products in general are exempt. For years before January 1, 2018, digital audio-visual work and digital audit work sold to end users that do not have the right of permanent use – taxable. After Jan. 1, 2018, the sale of specified digital products or a digital code is subject to tax.	Not taxable (?).





# Arkansas (SSUTA)



**STATE OF ARKANSAS  
DEPARTMENT OF FINANCE AND ADMINISTRATION  
SALES AND USE TAX SECTION  
P.O. BOX 8092, LITTLE ROCK, AR 72203-8092**

## **Candy, Soft Drinks, and Digital Audio Works**

Act 141 of the 2017 Legislative Session becomes effective on January 1, 2018. This Act removes candy and soft drinks from the definitions of “Food” and “Food Ingredients” and applies the full 6.5% State sales and use tax rate to these items. All City and County sales and use tax rates continue to apply on the sale of these items. This Act also applies the total state, city and county sales and use tax to the sale price of specified digital products or a digital code. Specified Digital products include digital audio works, digital audio-visual works, digital books, and digital code.



# Arkansas (SSUTA)

- [Comprehensive Annual Financial Report](#)
- Sales revenue (in billion): \$3.28
- Population (in million): 3.014
- Per capita sales tax: 1088
- Little Rock
- Republican
- Regnat populus (The people rule)
- The term computer software does not include software delivered electronically
- 2017 = tax “specified digital goods”



# California

- California does not tax digital goods unless they are in a tangible medium, CDs, etc.
  - Some objections - with municipalities. See news. California’s statutory definitions of “computers,” and “programs” are rather elaborate – yet mostly these items are non-taxable. CA REV Tax § 6051.
- California is primarily interested in tax on “storage media” defined as “hard disks, floppy disks, diskettes, magnetic tape, cards, paper tape, drums and other devices upon which information is recorded.” 18 CA ADC § 1502.
- Charges for the transfer of computer-generated output are subject to tax where the true object of the contract is the output and not the services rendered in producing the output. Examples include artwork, graphics, and designs. 18 CA ADC § 1502(c)(4).
- SaaS is expressly not taxable. California’s rules are very detailed (dissecting taxation/non taxation of copying, address label printing, etc.) and complex to be summarized here.

	Custom Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
CA	Exempt.	Exempt. Downloaded computer software is exempt if the purchaser does not obtain possession of TPP in the transaction.	Taxable (?). Prewritten computer software is taxable unless it is transferred in connection with a technology transfer agreement.	Not taxable. The sale or lease of a prewritten program is not taxable if the program is transferred by remote telecommunications from the seller’s place of business to or through the purchaser’s computer and the purchaser does not obtain possession of TPP.	Exempt. The sale and use tax is imposed on the sale or use of TPP.	Not taxable. The statute does not list the providing of cable/satellite TV services as taxable.



## Regulation 1502. Computers, Programs, and Data Processing.

*Reference:* Sections 995.2, 6006, 6007, 6010, 6010.9, 6011, 6012, 6015, and 6016, Revenue and Taxation Code.

**(a) IN GENERAL.** "Automatic data processing services" are those rendered in performing all or part of a series of data processing operations through an interacting assembly of procedures, processes, methods, personnel, and computers.

Automatic data processing services may be provided by manufacturers of computers, data processing centers, systems designers, consultants, software companies, etc. In addition, there are banks and other businesses which own or lease computers and use them primarily for their own purposes but occasionally provide services to others. Businesses rendering automatic data processing services will be referred to herein as "data processing firms."

### **(b) DEFINITIONS OF TERMS.**

(1) APPLICATION. The specific job performance by an automatic data processing installation. For example, data processing for a payroll may be referred to as a payroll application.

(2) CODING. The list, in computer code, of the successive computer instructions representing successive computer operations for solving a specific problem.

(3) COMPUTER. A computer is an electronic device (including word processing equipment and testing equipment) or combination of components, which is programmable and which includes a processor (central processing unit or microprocessor), internal memory, and input and output connections. Manufacturing equipment which incorporates a computer is a computer for purposes of this regulation. However, the term does not include manufacturing equipment which operates under the control of mechanical or electronic accessories, the attachment of the equipment of which is required for the machine to operate. An electronic device otherwise qualifying as a computer remains a computer even though it may be used for information processing, data acquisition, process control or for the control of manufacturing machinery or equipment.

(4) CUSTOM COMPUTER PROGRAM AND PROGRAMMING. A computer program prepared to the special order of the customer. A program prepared to the special order of the customer qualifies as a custom program even though it may incorporate preexisting routines, utilities or similar program components. It includes those services represented by separately stated charges for modifications to an existing prewritten program which are prepared to the special order of the customer.

(5) DATA ENTRY (INCLUDING ENCODING). Recording information in or on storage media by punching holes or inserting magnetic bits to represent letters, digits, and special characters.

(6) DIGITAL PRE-PRESS INSTRUCTION. The creation of original information in electronic form by combining more than one computer program into specific instructions or information necessary to prepare and link files for electronic transmission for output, within the printing industry, to film, plate, or direct to press, which is then transferred on electronic media such as tape or compact disc.

(7) INPUT. The information or data transferred, or to be transferred, from storage media into the internal storage of the computer.

(8) OUTPUT. The information transferred from the internal storage of the computer to storage media or tabulated listing.

(9) PREWRITTEN PROGRAM. A program held or existing for general or repeated sale or lease. The term also includes a program developed for in-house use which is subsequently offered for sale or lease as a product.



- *Regulation 1502 – Computers, Programs and Data Processing*

**(c) BASIC APPLICATIONS OF TAX.**

(1) The transfer of title, for a consideration, of tangible personal property, including property on which or into which information has been recorded or incorporated, is a sale subject to tax.

(2) Charges for producing, fabricating, processing, printing, imprinting or otherwise physically altering, modifying or treating consumer-furnished tangible personal property (cards, tapes, disks, etc.), including charges for recording or otherwise incorporating information on or into such tangible personal property, are generally subject to tax.

(3) A transfer for a consideration of the title or possession of tangible personal property which has been produced, fabricated, or printed to the special order of the customer, including property on which or into which information has been recorded or incorporated, is generally a sale subject to tax. However, if the contract is for the service of researching and developing original information for a customer, tax does not apply to the charges for the service. The tangible personal property used to transmit the original information is merely incidental to the service.

(4) Charges for the transfer of computer-generated output are subject to tax where the true object of the contract is the output and not the services rendered in producing the output. Examples include artwork, graphics, and designs. However, the transfer by the seller of the original information created by digital pre-press instruction is not subject to tax if the original information is a custom computer program as explained in subdivision (f)(2)(F).

(5) Charges for processing customer-furnished information (sales data, payroll data, etc.) are generally not subject to tax. (For explanation and specific application of tax, see subdivision (d).)

(6) Leases of tangible personal property may be subject to tax under certain conditions. (See Regulation 1660 for application of tax to leases.)

(7) Charges made for the use of a computer, on a time-sharing basis, where access to the computer is by means of remote telecommunication are not subject to tax. (See subdivision (i).)

(8) Generally data processing firms are consumers of all tangible personal property, including cards and forms, which they use in providing nontaxable services unless a separate charge is made to customers for the materials, in which case tax applies to the charge made for the materials.



# California

- [Lucent Technologies, Inc. v. Board of Equalization](#), 241 Cal.App.4th 19 (2015) (taxpayer wins; the court applied the California technology transfer agreement [TTA] exemption and outlined the burden of proof requirements)
- [Nortel Networks Inc. v. Board of Equalization](#), 191 Cal.App.4th 1259 (2011) (taxpayer wins; prewritten computer software taxable if not subject to a copyright/patent and is held for general sale)
- [Dell, Inc. v. Super. Court](#), 159 Cal. App. 4th 911 (2008) (in a class action, consumers win; in mixed transactions, the burden of proof is on the taxpayer)
- [Navistar Int'l Trans. Corp v. Bd. Of Equalization](#), 8 Cal. App. 4th 868 (1994)(tax authority wins; the documents and programs were tangible personal property; the fact that taxpayer developed software did not change taxability determination when it was sold to a third party)





# California

- [Revenue Estimates](#)
- **Sales revenue (in billion):** **\$26.2**
- **Population (in million):** **37.254**
- **Per capita sales tax:** **703**
- Sacramento
- Democratic
- Eureka (I have found it)
- State v. municipalities
- Tangible medium (?)





## California: how to best tax streaming services

Mar 27, 2017 | Gail Cole

Officials and lawmakers in **California** are squabbling over whether to tax streaming services, and how to best go about it. In Pasadena, the services are already **subject to the city's utility users tax (UUT)**. Several other California cities also apply UUT to video streaming services, and others want to follow suit. But this is a controversial tax, and a bill to prohibit local taxation of video streaming services has been introduced in the California Legislature.

Local governments and agencies are currently permitted “to impose various taxes and fees.” **AB 252** would prohibit the imposition by any local government “of a tax on video streaming services, including, but not limited to, any tax on the sale or use of video streaming services or any utility user tax on video streaming services.”

“Video streaming services” are defined as “the provision of video content sent in compressed form over the Internet and displayed by the viewer in real time for a fee on a subscription basis.”

Matthew Hawkesworth, Director of Finance for Pasadena, maintains that “these types of video services have **always been eligible to be taxable**” under the city’s utility user tax. But AB sponsor **Assemblymember Sebastian Ridley-Thomas** questions the wisdom of that stance: “Video streaming companies like Netflix and Hulu are entertainment providers, not local utilities akin to electricity, sewer, or even cable television. Taxes should not be applied to their services without careful consideration.” His bill would prevent the taxation of these services until Jan. 1, 2023.

<https://www.avalara.com/taxrates/en/blog/2017/03/california-how-best-tax-streaming-services.html>



# Colorado

- Colorado does not tax software unless it is prewritten and sold in a tangible medium.
  - Colorado even specifically states that, “Computer software is not delivered to the customer in a tangible medium if it is provided through an [application service provider](#), delivered by electronic computer software delivery, or transferred by load and leave computer software delivery.” CO ST § 39-26-102(c)(I). **CHECK 1 Colo. Code Regs § 201-5 (SR-38)**
- Interestingly, Colorado taxes digital goods, even though it does not have a specific statute. General Information Letter, 2011 WL 10755855, at 2

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
CO	Exempt.	Exempt. Software that is not delivered to the customer in a tangible medium is not taxable, such as if it is provided through an application service providers, delivered by electronic software delivery, or transferred by loan and leave software delivery. **	Taxable. Prewritten computer software is taxable. Computer software is deemed to be tangible personal property and subject to tax only if: (1) it is prepackaged for repeated sale or license; (2) its use is governed by a tear-open nonnegotiable license agreement; and (3) it is delivered to the customer .	Not taxable. A company that provided web-based solutions for sending, receiving, and tracking large digital files via the Internet whose customers purchased monthly/annual subscriptions priced according to the features included in the package was found to be providing a service and, therefore, was not subject to tax.	Taxable. Digital photographs, movies, books and movies have a physical existence and are no less taxable than had they been delivered in paper or celluloid form.	Not taxable. However, such services are taxable if bundled with intrastate charges.

- [Ball Aerospace & Technologies Corp. v. City of Boulder](#), 304 P.3d 609 (Colo. App. 2010)(tax authority wins; downloaded software is taxable, as is access to software used to access search engine to obtain information; interpretation of “machine-readable form”) \*\*
- [City of Boulder v. Leanin' Tree, Inc.](#), 72 P.3d 361, 362 (Colo. 2003)(taxpayer wins, the true object of the transaction was intellectual property, not the physical object)



# Colorado

- [Annual Report](#)
- **Sales revenue (in billion):** **\$3.2**
- **Population (in million):** **5.695**
- **Per capita sales tax:** **562**
- Denver
- Democratic
- Nil sine numine (Nothing without the Deity)
  
- Digital goods – Letter
- SaaS (?) – Ball Aerospace case - 2010



# Connecticut

- Connecticut has recently enacted changes (eff. 1/1/2020).
  - clear guidance seeking to tax all known digital goods - software and digital content, including streaming content (remarkably and uniquely, Connecticut, however, offers a significantly lower tax rate for digital goods accessed electronically, which is referred to as data processing, at 1%).
  - The definition of tangible personal property (TPP) is broad and all-encompassing.
- While telecommunications services are treated as its own category of taxable services, Connecticut taxes community antennae television service and certified competitive video service, i.e., all manners of streaming and broadcasting digital content.
- Connecticut also taxes “computer and data processing services.” CT ST 12-407(37)(A) at the “data processing” rate of 1%.

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
CT	<i>Exempt. Separately stated license fees or charges for the possession and use of custom software are exempt. Designing custom software is taxable at 1% rate for computer and data processing services.</i>	Taxable. Effective Oct. 1, 2019, TPP subject to the full sale tax rate of 6.35% includes canned or prewritten software that is e-accessed or transferred... Prior to Oct. 1, 2019, downloadable computer software is generally taxable at 1% for computer and data processing services but the general sales tax rate of 6.35% applies if TPP is provided.	Taxable. Canned or pre-written software is taxable at the general sales tax rate of 6.35%.	There is no guidance issued on SaaS. Although Connecticut has not issued guidance on the taxation of cloud computing or SaaS, the state likely would view such transactions as a computer or data processing service.	Taxable. Sales or purchases of digital downloads are subject to sales or use tax. If TPP is provided in the transaction, the sale or purchase of digital downloads is treated as the sale or purchase of TPP and taxable at the full sales and use tax rate. Prior to Oct. 1, 2019, if no TPP provided, sales of digital downloads were treated as purchase of data processing and taxable at 1%. After Oct. 1, 2019, the sale and use tax rate on digital goods that is e-accessed will be 6.35%.	Taxable.





450 Columbus Blvd Ste 1  
Hartford CT 06103-1837

## STATE OF CONNECTICUT DEPARTMENT OF REVENUE SERVICES

SN 2019(8)

### SPECIAL NOTICE

### Sales and Use Taxes on Digital Goods and Canned or Prewritten Software

**Purpose:** Effective October 1, 2019, sales of “digital goods,” which includes audio works, visual works, audio-visual works, reading materials or ring tones, which are electronically accessed or transferred, will be subject to sales and use taxes at the standard 6.35% rate. Until October 1, 2019, these digital goods will continue to be taxable at the 1% rate for computer and data processing services.

As of October 1, 2019, electronically accessed or transferred canned or prewritten software will also be taxable at the 6.35% rate, except for sales of such software to a business for use by the business, which will remain taxable at the 1% rate for computer and data processing services.

- Podcasts;
- Stock photographs or stock art work;
- Clip art;
- Greeting cards;
- Movies;
- Videos;
- Entertainment programs;
- Magazines; **and**
- Books.

Unless contracts or other documents specifically state otherwise, digital goods will be presumed to be electronically delivered or transferred into Connecticut, and subject to Connecticut sales and use tax, if the billing address of the consumer or subscriber is in Connecticut.

**Digital Goods:** Effective October 1, 2019, digital goods will be included in the definition of “tangible personal property” and taxable at the 6.35% rate. Before October 1, 2019, digital goods were considered to be a sale of computer and data processing services taxable at the 1% rate. The 6.35% rate of tax will apply to digital goods regardless of the format of the sale:

- Digital goods sold on an individual basis;
- Digital goods sold as a subscription service;
- Digital goods sold as an “in-app” purchase; **or**
- Digital goods sold as a code that grants a user the right to obtain one or more specified digital products.

The term “digital goods” includes all electronically accessed or transferred audio works, visual works, audio-visual works, reading materials or ring tones.

“Electronically accessed or transferred” includes both downloading and streaming of digital goods onto an electronic device.

Some examples of digital goods include electronically accessed or transferred:

- Music;
- Audiobooks;

address of the consumer or subscriber is in Connecticut.

The following products will not be subject to tax at the 6.35% rate:

- Sales of newspapers, and sales of magazines by subscription, whether sold as physical copies or electronically accessed or transferred. Such sales are exempt under Conn. Gen. Stat. § 12-412(114);
- Sales of college textbooks whether sold in hard copy, or electronically accessed or transferred. Such sales are exempt under Conn. Gen. Stat. § 12-412(109); **and**
- Charges for access to an online professional or academic research database, which will continue to be taxable at the 1% rate for computer and data processing services.

**Sales of Canned or Prewritten Software for Non-Business Use:** Effective October 1, 2019, canned or prewritten software, and any additional content related to such software, whether or not provided with any tangible personal property, that is sold for non-business use is considered to be tangible personal property taxable at the standard 6.35% rate.



# Connecticut

**Sales of Computer Software:** The tax rate for sales of computer software depends on whether the software is prewritten or custom.

**Canned or prewritten software.** Canned or prewritten computer software is tangible personal property. The sale, leasing, or licensing of the software (including upgrades) is taxable at 6%.

**Custom software.** The processes of designing, creating, and developing custom software, or adapting or modifying existing software to the particular needs of a customer, are computer and data processing services taxable at the 1% rate.

Custom software prepared to the special order of a single customer may sometimes be prepared from prewritten software that has had substantial modifications to its functions or the purpose of its program. The software may have been changed to such a degree that it bears little resemblance to any but the most basic functions of the prewritten software on which it was based. Charges for upgrades of custom software are charges for computer and data processing services.

Because custom software is not tangible personal property, any charges (such as license fees) for the mere use and possession of the software, stated separately from charges for taxable computer and data processing services or prewritten software, are not subject to sales and use taxes.



# Connecticut

- [Annual Report](#)
- Sales revenue (in billion): \$4.5
- Population (in million): 3.572
- Per capita sales tax: 1260
- Hartford
- Democratic
- Qui transtulit sustinet (He who is transplanted still sustains)
  - Business costs are 10% higher than the national average, due in part to energy costs that are 62% higher. The Nutmeg State rates fifth overall in quality of life thanks to low crime and poverty rates, a healthy populous and strong schools. But the regulatory climate and fiscal health rank among the worst in the nation.
- Different tax rate for custom software/treated as service





# District of Columbia

- Washington, D.C. taxes all software and the streaming of digital products as well as live broadcasting, albeit the latter is taxable as telecommunication or a type of utility service, not as a digital product.
- Software is not viewed within the definition of “digital goods” but rather as data processing services.
- DC expressly taxes SaaS.

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
DC	Taxable.	Taxable (whether canned, prepackaged, or customized).	Taxable.	Taxable. Tax applies to data processing services, which include the maintenance, input, and retrieval of information; the provision of direct access to computer equipment; and computerized data and information storage and manipulation.	Taxable.	Not taxable. Cable and satellite television are subject to a separate gross receipt tax under DC Code 47-2501.01.



# District of Columbia

## Taxation of Digital Goods in the District of Columbia

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Thursday, January 3, 2019

The District of Columbia Council has passed legislation amending the sales and use tax treatment of digital goods sold or used in the District. [See Internet Sales Tax Emergency Amendment Act of 2018](#) <sup>HP</sup>, approved on December 31, 2018 (D.C. Bill 22-1070).

Under D.C. Code § 47-2002(a), a sales tax is imposed upon all vendors for the privilege of making a “retail sale” or “sale at retail” of tangible personal property and certain selected services. Under D.C. Code § 47-2202(a), a use tax is imposed on the use, storage, or consumption of any tangible personal property and service sold or purchased at retail.

As of January 1, 2019, D.C. Code §§ 47-2001(n)(1)(BB) and 47-2201(a)(1)(R) now include the sale of or charges for digital goods in the definition of “retail sale” and “sale at retail”. For purposes of the sales and use tax, D.C. Code § 47-2001(d-1) defines the term “digital goods” to mean digital audiovisual works, digital audio works, digital books, digital codes, digital applications and games, and any other otherwise taxable tangible personal property electronically or digitally delivered, whether electronically or digitally delivered, streamed or accessed and whether purchased singly, by subscription or in any other manner, including maintenance, updates and support.

<https://otr.cfo.dc.gov/release/taxation-digital-goods-district-columbia>



# District of Columbia

<i>Digital Good</i>	<i>Subject to Sales Tax?</i>	<i>Rationale</i>
<i>Applications</i>	Yes	<i>These sales are taxable digital goods. D.C. Code § 47-2001(d-1).</i>
<i>Software – Canned</i>	Yes	<i>These sales are taxable as data processing services. D.C. Mun. Regs. §9-474.4.</i>
<i>Software – Prepackaged</i>	Yes	<i>These sales are taxable as data processing services. D.C. Mun. Regs. §9-474.4.</i>
<i>Software – Customized</i>	Yes	<i>These sales are taxable as data processing services. D.C. Mun. Regs. §9-474.4.</i>
<i>Digital News and Digital Periodicals</i>	Yes	<i>These sales are taxable as “the furnishing of general or specialized news or current information” and as “news clipping service” under D.C. Code §47-2001(n)(1)(N)(ii).</i>
<i>Digital Books</i>	Yes	<i>These sales are taxable digital goods. D.C. Code § 47-2001(d-1).</i>
<i>Digital Audio Books</i>	Yes	<i>These sales are taxable digital goods. D.C. Code § 47-2001(d-1).</i>
<i>Digital Music Downloads and Streaming</i>	Yes	<i>These sales are taxable digital goods. D.C. Code § 47-2001(d-1).</i>
<i>Digital Video Downloads</i>	Yes	<i>These sales are taxable digital goods. D.C. Code § 47-2001(d-1).</i>
<i>Streaming Video Services</i>	Yes	<i>These sales are taxable digital goods. D.C. Code § 47-2001(d-1).</i>



<https://otr.cfo.dc.gov/release/taxation-digital-goods-district-columbia>



# District of Columbia

- [Comprehensive Annual Financial Report](#)
- [Fiscal Policy Institute](#)
- **Sales revenue (in billion):** **\$1.3**
- **Population (in million):** **0.702455**
- **Per capita sales tax:** **1851**
- DC
- Democratic
- Justitia Omnibus (Justice to All)
- Similar to CT, DC taxes customized and canned software and treats software as “data processing service”



# Florida

- The definition of “tangible personal property” does not include software. FL ST § 212.02.
- SaaS is non-taxable in Florida when it is only a service transaction and is not accompanied by the transfer of tangible personal property.
- Florida taxes streaming of video content etc. under its communications services tax (CST), to include:
  - video service (for example, television programming or streaming), whether provided by a cable, telephone, or other communications services provider;
  - direct-to-home satellite.

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
FL	Exempt.	Exempt. A charge for furnishing information by e-image that appears on a subscriber's video display screen is not a sale of TPP and is not taxable as an info service.	Taxable. (?)	There is no guidance. However, monthly fees allowing customers access to pre-written software do not constitute taxable transactions, provided the software is accessed electronically.	Exempt. Digital products are not TPP.	Taxable. Cable and satellite tv are among the “communications services” subject to communications services tax.





## Florida Communications Services Tax

Communications services tax (CST) is imposed on each sale of communications services in Florida. Examples of communications services include, but are not limited to:

- Cable and satellite television,
- Video and music streaming,
- Telephone, including Voice-over-Internet Protocol (VoIP),
- Mobile communications, and similar services.

Dealers generally collect the tax from customers and report and pay the tax to the Florida Department of Revenue. If a dealer does not collect tax from a customer, the customer is responsible for paying the communications services use tax.



# Florida

- [Comprehensive Annual Financial Report](#)
- **Sales revenue (in billion):** **\$25.3**
- **Population (in million):** **21.3**
- **Per capita sales tax:** **1188**
- Tallahassee
- D/R
- In God We Trust
- Software (?)





# Georgia (SSUTA)

	<b>Custom Computer Software</b>	<b>Downloaded Computer Software</b>	<b>Prewritten Computer Software</b>	<b>Software as a Service (SaaS)</b>	<b>Digital Products</b>	<b>Cable Satellite TV</b>
GA	Exempt.	Exempt. The sale of prewritten software delivered electronically or by load and leave is exempt.	Taxable. Prewritten computer software is taxable (?).	Not taxable.	Exempt.	Not taxable. Tax is due on any TPP consumed.



# Georgia (SSUTA)

Georgia Letter Ruling: LR SUT-2017-04

Dated: February 23, 2017

Topic: Services, Software & Online Courses

## **Ruling**

Taxpayer's charges for sales of electronically-delivered software, online courses and hosting, are not subject to sales and use tax to the extent that the customer does not receive either prewritten computer software in a tangible medium or receive the vested right to receive prewritten computer software in a tangible medium. The customer's invoice or supporting documentation must indicate that the software was delivered to the customer exclusively in an electronic format.

Software-related services are not specifically identified in the Georgia Code as services subject to tax. Thus, charges made by Taxpayer for software-related services, including customization and translation, are not subject to the tax. However, Taxpayer is liable for tax on all tangible personal property used to provide its software-related services.

<https://dor.georgia.gov/lr-sut-2017-04>



# Now Georgia Is Pursuing a “Netflix Tax” to Cash in on Digital Streaming. Is It Time to Worry?

As always, the government is seeking to penalize innovation by taxing it rather than celebrating it.

Wednesday, January 16, 2019

haven't kept trying. House Ways and Means Committee Chair Jay Powell (R) **defended** the state's new tax push by saying that it isn't new at all but rather a reframing of previously instituted taxes:

I think there's an increasing awareness that we're really not talking about new taxes. We're talking about a market that has converted tangible personal property that historically has been subject to sales tax into a digital format.

As always, the government is seeking to penalize innovation by taxing it rather than celebrating it.



# Georgia (SSUTA)

- [Annual Statistical Reports](#)

- Sales revenue (in billion): \$5.939
- Population (in million): 10.519
- Per capita sales tax: 565
- Atlanta
- Republican
- Wisdom, justice, and moderation



# Hawaii

- Even in the absence of a specific description of digital goods, Hawaii’s regulations plainly state that Hawaii law “subject[s] virtually every economic activity to the general excise tax.”
- Per recent internet publications, “Hawaii's general excise tax (GET) applies to all non-exempt goods and services, and SaaS is considered a non-exempt service.”

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
HI	Taxable.	Taxable.	Taxable.	There is no guidance; however, it is not specifically exempted by statute so it is most likely taxable.	Taxable.	Taxable.



# Hawaii

- [Annual Report](#)
- Sales revenue (in billion): \$3.395
- Population (in million): 1.42
- Per capita sales tax: 2391
- Honolulu
- Democratic
- Ua mau ke ea o ka aina i ka pono (The life of the land is perpetuated in righteousness)



# Idaho

- Idaho views software as a subset of “tangible personal property.”
- The term “computer software” is interpreted to exclude custom software, software remotely accessed or delivered via load and leave method, but to include digital music, books, videos and games if transferred *permanently*.
- Software as a service (SaaS) is considered a non-taxable service. ID ADC 35.01.02.027.

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
ID	Exempt.	Exempt. There is an exclusion from the definition of TPP for computer software delivered electronically, remotely accessed, or by load and leave...	Taxable. See exclusion for downloaded computer software.	Not taxable. There is an exclusion from the definition of TPP for computer software that is delivered electronically, remotely accessed computer software, and computer software that is delivered by the load-and-leave method where the vendor or its agent loads the software at the user's location but does not transfer any TPP containing the software to the user.	Taxable. TTP includes computer software that constitutes digital music, digital books, digital videos, and digital games when the purchaser has a permanent right to use such digital products, regardless of the method of delivery or access.	Not taxable. Cable or satellite TV services are not among the taxable services enumerated under the law.





# Idaho

- [Annual Reports](#)
- Sales revenue (in billion): **\$1.784**
- Population (in million): **1.754**
- Per capita sales tax: **1017**
- Boise
- Republican
- Esto perpetua (Let it Be Perpetual)



# Illinois

- A tax is imposed upon persons engaged in the business of selling at retail tangible personal property, including computer software. IL ST CH 35 § 105/3. The term computer software is defined as “all types of software,” but that only “canned software is considered to be tangible personal property regardless of the form in which it is transferred or transmitted, including tape, disc, card, electronic means or other media. 86 IL ADC 130.1935.
- With respect to digital products, Illinois regulations provide that, “Digital music, digital books, digital videos, and digital games are tangible personal property regardless of the delivery or access method but only if the purchaser has a *permanent* right to use.
- So streaming is not taxed unless it is in the city of Chicago, which taxes streaming.
- [\*First Nat’l Bank of Springfield\*](#), 85 Ill. 2d 84 (Ill, 1981)(taxpayer wins, the court sees software differently than movies - calling intangible)

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
IL	Exempt.	Taxable.	Taxable.	Not taxable. SaaS is not considered a transfer of TPP.	Exempt. However, downloads of canned software are subject to tax.	Not taxable. The telecommunications excise tax applies to cable/satellite tv.



# Illinois

- **Illinois Department of Revenue provides guidance through detailed regulations and private letter rulings, but it is not succinctly summarized, and is undergoing revision.**



# Indiana (SSUTA)

- As of July 1, 2018, prewritten computer software . . . that is remotely accessed over the internet . . . is not considered an electronic transfer of computer software and is not considered a retail transaction.
- Electronic transfer of specified digital products is defined to occur when the vendor “grants to the end user the right of *permanent* use of the specified digital products that is not conditioned upon continued payment by the purchaser.” IN ST 6-2.5-4-16.4.
- Per guidance electronic transfer - still taxable and if storage - may be rental.
- Radio, video or cable television services are a taxable retail service transaction. IN ST 6-2.5-4-11(a).

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
IN	Exempt.	Taxable.	Taxable.	Not taxable. Charges for accessing prewritten computer software maintained on a vendor's or a third party's computer or servers are not subject to tax after 6/30/2018.	Taxable. Tax applies to electronically transferred digital audio works, digital audiovisual works, or digital books.	Taxable. Such services are taxable in Indiana when service terminates in Indiana. <a href="#">↑</a>



# Indiana (SSUTA)



## INDIANA DEPARTMENT OF REVENUE

Indiana Government Center  
100 N. Senate Ave  
Indianapolis, IN 46204-2253

### INFORMATION BULLETIN #8

#### SALES TAX

DECEMBER 2019

(Replaces Bulletin #8 dated June 2018)

Effective Date: Upon Publication

As of July 1, 2018, prewritten computer software sold, rented, leased, or licensed for consideration that is remotely accessed over the internet, over private or public networks, or through wireless media, is not considered an electronic transfer of computer software and is not considered a retail transaction. In other words, transactions for prewritten computer software remotely accessed from a hosted computer or server or through a pool of shared resources from multiple computers and servers (“cloud computing”), without having to download the software to the user’s computer, are not considered retail transactions, and therefore the purchase, rental, lease, or license of that software is not subject to Indiana sales or use tax..

<https://www.in.gov/dor/reference/files/sib08.pdf>



# Indiana (SSUTA)

- [Annual Report](#)
- **Sales revenue (in billion):** **\$8**
- **Population (in million):** **6.691**
- **Per capita sales tax:** **1196**
- Indianapolis
- Republican
- The Crossroads of America



# Iowa (SSUTA)

- Iowa has implemented new laws in January 2019: prewritten computer software is subject to sales tax whether delivered or accessed in physical form (as tangible personal property) or electronically (as a specified digital product).
  - Custom software sold in either physical or electronic form is taxed in the same manner as prewritten computer software.
- Iowa taxes electronically transferred products (transferred by any means), information services, services related to operating specified digital products, etc. and storage.
  - Rather than adding the term "access" to the definition of "software" to capture taxability of "software as a service" or "Electronically transferred" as "obtained or accessed by the purchaser by means other than tangible storage media..."
- In Iowa, SaaS is expressly taxable. IA ST 423.2.

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
IA	Exempt	Exempt, unless delivered via load and leave; non-prewritten or custom software is exempt whether e-delivered or via load and leave.	Taxable. Effective Jan. 1, 2019, the sales price of prewritten computer software sold to a commercial enterprise for use exclusively by the commercial enterprise is exempt.	Taxable effective Jan. 1, 2019.	Exempt prior to 12/31/2018. Eff. 1/1/2019, digital goods that are e-transferred are taxable.	Taxable.





# Iowa enacts major tax reform legislation

On May 30, 2018, Iowa Gov. Kim Reynolds signed legislation, S.F. 2417, which provides major tax reform.<sup>1</sup> Under S.F. 2417, Iowa's individual income tax rates will be immediately reduced, corporate income tax rates will be reduced beginning in 2020, the income tax law is conformed to recent federal income tax changes generally beginning in 2019, and the sales tax is expanded to include many digital and online computer services, along with an aggressive expansion of Iowa's sales tax nexus provisions.

<https://www.grantthornton.com/library/alerts/tax/2018/SALT/F-J/IA-enacts-sweeping-tax-reform-legislation.aspx>



# Iowa (SSUTA)

## Taxation of Specified Digital Products, Software, and Related

Home

Print

Before January 1, 2019, whether a digital good or service was subject to sales tax depended on various factors. To be subject to sales tax, a digital product had to constitute either tangible personal property or an enumerated service. Further, all products delivered electronically were exempt from sales tax.

It is important to note that in addition to this informal guidance, the Department will engage in administrative rule-making on these issues in the near future. This will include revision or deletion of existing rules and promulgation of new rules.

### Taxation of Software has Changed

Before January 1, 2019, prewritten computer software was subject to sales tax if it was delivered via a disc or other tangible medium but exempt if delivered in an electronic form. Also exempt was the service of creating custom software.

Beginning January 1, 2019, prewritten computer software is subject to sales tax whether delivered or accessed in physical form (as tangible personal property) or electronically (as a specified digital product). In addition, custom software sold in either physical or electronic form is taxed in the same manner as prewritten computer software.

There are also two new exemptions that may be relevant to software purchases, discussed later in this guide.

<https://tax.iowa.gov/taxation-digital-products>



## Iowa (SSUTA)

- [Annual Report](#)
- Sales revenue (in billion): \$3.2
- Population (in million): 3.16
- Per capita sales tax: 1014
- Des Moines
- D/R
- Our liberties we prize and our rights we will maintain.



# Kansas (SSUTA)

- In Kansas, tangible personal property includes prewritten computer software ("*regardless of the method by which the title, possession or right to use the tangible personal property is transferred*"). KS ST 79-3602
  - No definition of "digital goods."
  - Streaming and digital goods delivered electronically are not taxable.
  - SaaS is non-taxable. SaaS providers are referred to as "Application Service Providers" (ASPs). No tax on streaming of digital goods delivered electronically - but yes as to cable, etc. services
- Yes, KS ST 79-3603(k) - Exception -sales of subscription to radio and television services are subject to Kansas state sales tax. K.S.A. 79-3603(k) 24)

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
KS	Exempt.	Taxable.	Taxable.	Not taxable. Hosted software is not taxable because it is not an enumerated taxable service; it is not considered a lease since the customer does not have control over or have possessory rights to the software, and it is not considered prewritten computer software because it is not delivered to subscribers or installed on their computers unless the software is billed to the subscriber as a separate line item charge.	Exempt.	Taxable.

- [\*In the matter of AT&T Technologies, Inc.\*](#), 242 Kan. 554 (1988)(taxpayer wins; the phone company was the end-user of the equipment).



# Kansas (SSUTA)



*Kathleen Sebelius, Governor*  
*Joan Wagnon, Secretary*

[www.ksrevenue.org](http://www.ksrevenue.org)

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## KANSAS DEPARTMENT OF REVENUE POLICY AND RESEARCH

### **Revised Sales Tax Guidelines: Taxing Charges for Computer Products and Services and Internet Related Sales and Services**

***Date Issued: July 23, 2010***

***Tax Types: Sales and Use Tax      Document Number: EDU-71R***

(e) **Charges for using software on a remote computer.** A lease does not include obtaining remote access to someone else's computer software and equipment via the Internet or other electronic means when the customer does not have control over or have possessory rights to the software or equipment. This includes charges billed by an application service provider (ASP).

The time sharing of a computer or charges to access a computer are taxable rentals when the lessee is given physical possession of a computer in Kansas or has the right to personally control a computer at a location in Kansas. These same rules apply to the charges for access to other computer equipment.

<https://www.ksrevenue.org/pdf/edu71r.pdf#search=computer> 16 pages



# Kansas (SSUTA)

- [Annual Statistical Report](#)
- **Sales revenue (in billion):**                      **\$2.7**
- **Population (in million):**                      **2.911**
- **Per capita sales tax:**                      **928**
- Topeka
- Republican
- Ad astra per aspera (To the stars through difficulties)



# Kentucky (SSUTA)

- Kentucky is not as clear in its guidance on digital goods, referring to them as digital property. Still, all the elements appear to be in place to require taxpayers in Kentucky to collect tax for prewritten software and for both SaaS and streaming service.
- Kentucky clarifies statutorily that the levy on the retail sale applies *regardless of whether the purchase has the right to permanently use the property or to access or retain the property*.
- The term “digital property” does not include movies or audio-visual works (only digital audio works, digital books, finished artwork, digital photographs, periodicals, newspapers, magazines . . . video games . . . any digital code) -- still the streaming of movies appears taxable under multichannel video programming services (which include cable, satellite, internet protocol and video streaming).

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
KY	Exempt.	Taxable if prewritten.	Taxable.	Not taxable. Although no official guidance has been issued, it is likely not taxable	Taxable. Digital property is subject to sales and use tax regardless of whether the purchaser has the right to personally use the property, the purchaser's right to access or retain the property is not permanent, or the purchaser's right of use is conditioned upon payment. Digital property that is e-transferred is taxed separately from TPP.	Not taxable. Excluded from the definition of telecommunications services if the charges for the goods or services are separately itemized on the bill to the purchaser. However, cable and satellite tv services are subject to an excise tax of 3% on multichannel video programming services and a 2.4% gross revenues tax on multichannel video programming services.





# Kentucky (SSUTA)

## Kentucky to Begin Taxing Video Streaming Services under Telecom Tax

[Blog](#) Inside SALT

**McDermott Will & Emery**



**McDermott  
Will & Emery**

**USA** | May 24 2019

Legislators in Frankfort added a new “video streaming service” tax to the omnibus tax bill (HB 354) as part of a closed-door conference committee process before the bill was hastily passed in the House and Senate. Notably, the new video streaming service tax was not previously raised or discussed as part of HB 354 (or any other Kentucky legislation) before it was included in the final conference committee report that passed the General Assembly in March.



# Kentucky (SSUTA)

- [Annual Report](#)
- **Sales revenue (in billion):**                      **\$3.6**
- **Population (in million):**                      **4.468**
- **Per capita sales tax:**                      **806**
- Frankfort
- Republican
- United we stand, divided we fall



# Louisiana

- Louisiana contains a very elaborate definition of TPP (for example, it is not coins, repair of vehicles, information, or work product written on paper or magnetic or optical media, and that, starting 2005 - the definition shall not include customer consumer software). Yet, Louisiana's guidance appears to be under review and is not entirely clear.
- Based on Revenue Information Bulletin No. 11-005 dated February 14, 2011, "The sale or use of a *downloaded digital product such as music, a movie, book or game is a taxable transaction*. These transactions fall within the definition of tangible personal property found in LAC 61:I.4301 Tangible Personal Property." Thus, it appears that only downloaded digital goods currently qualify as taxable.
- Per recent internet publications, "Louisiana's July 2018 uniform tax matrix lists both prewritten computer software delivered electronically and non-prewritten (custom) computer software delivered electronically as taxable tangible property. Both can be found on the matrix classified as retail computer related products. We put an inquiry out to the Louisiana Department of Revenue to clarify details and find out the department is reviewing the taxability of SaaS. Stay tuned! We may have more concrete definitions soon."

	Custom Computer Software	Download Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
LA	Taxable, but exempt starting 7/1/2018.	Taxable. However, downloaded computer software is exempt if the primary purpose is to provide nontaxable technical or professional services.	Taxable.	Not taxable.	Taxable.	Not taxable. A tax exemption applies to regular cable TV service. TV programming services generally are excluded from the definition of telecommunications that are subject to tax regardless of the medium. Tax applies to cable or satellite TV pay-per-view or on-demand movies or programs.

[South Cent. Bell Tele. Co. v. Barthelemy](#), 643 So. 2d 1240 (La. 1994)(tax authority wins; application software; receipt of arrangement of matter - tangible and taxable)

[Normand v. Cox Communications](#), 167 So.3d 156 (La. App. 2014)(TP wins re: video on demand, pay per view are exempt cable services, not rentals of TPP)



# Louisiana



**Revenue Information Bulletin  
No. 11-005  
February 14, 2011  
Sales Taxes**

**Frequently Asked Questions Relating to RIB 10-028  
Temporary Suspension of Policy Statements Pertaining to Digital Transactions**

The Department released [Revenue Information Bulletin 10-028](#) stating that it has temporarily suspended the implementation of two Policy Statements pertaining to digital products. These two Policy Statements are [Revenue Ruling No. 10-001](#) and [Revenue Information Bulletin No. 10-015](#). The following are answers to questions frequently asked of the Department related to the suspension of the two Policy Statements.

2. Which transactions involving the sale, use or lease of digital products are included in the suspension?

The suspension of Revenue Ruling 10-001 affects only transactions in which the customer pays an access fee or subscription fee to obtain the use but not ownership of a website or software. The suspension of Revenue Information Bulletin 10-015 affects only Pay-Per-View and Video-on-Demand movies purchased for viewing by customers of cable television and satellite television providers.

3. Which digital products transactions are not included in the suspension?

The sale or use of a downloaded digital product such as music, a movie, book or game is a taxable transaction. These transactions fall within the definition of tangible personal property found in LAC 61:I.4301 *Tangible Personal Property*. This rule lists items considered to be examples of tangible personal property, which include durable goods, consumable goods, utilities, digital or electronic products such as canned computer software, electronic files, and “on-demand” and “video” downloads. This rule was published in the February 2003 issue of Louisiana Register. The publication of this rule was also announced in the Department’s July 2003 issue of [Tax Topics](#). This rule has not been suspended or repealed.

<http://revenue.louisiana.gov/LawsPolicies/RIB11005.pdf>



# Louisiana

- [Annual Report](#)
- Sales revenue (in billion): \$3.9
- Population (in million): 4.66
- Per capita sales tax: 837
- Baton Rouge
- Republican
- Union, Justice and Confidence



# Massachusetts

- Very detailed guidance on software, but not so much on digital products (video/audio content).
  - Whereas the method of delivery does not matter for software, apparently, it does for other digital goods.
  - Exempts transfers of digital content through cable television but not if transferred through direct broadcast satellite television, which is taxable.
- With respect to digital goods that are not really defined or mentioned, Massachusetts taxes direct satellite service but not cable service, and no taxing of processing data.
  - Massachusetts taxes satellite television providers, but that does not seem to include audio/video streaming.
- [\*Citrix Sys. V. Comm'r Revenue\*](#), 2020 WL 563319 (Supr. Jud. Ct. Mass. Feb. 5, 2020)

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
MA	Exempt.	Taxable. Deemed a transfer of TPP regardless of the method of delivery including transfers by e-means such as the Internet or load and leave.	Taxable. However, custom-modified canned software is generally not taxable.	Taxable.	Exempt.	Taxable.



## 'Netflix Tax' Proposed In Massachusetts

Paul McMurtry, D-Dedham, filed a bill calling for streaming giants like Netflix and Hulu to pay to support community access television.

By Jimmy Bentley, Patch Staff ✓

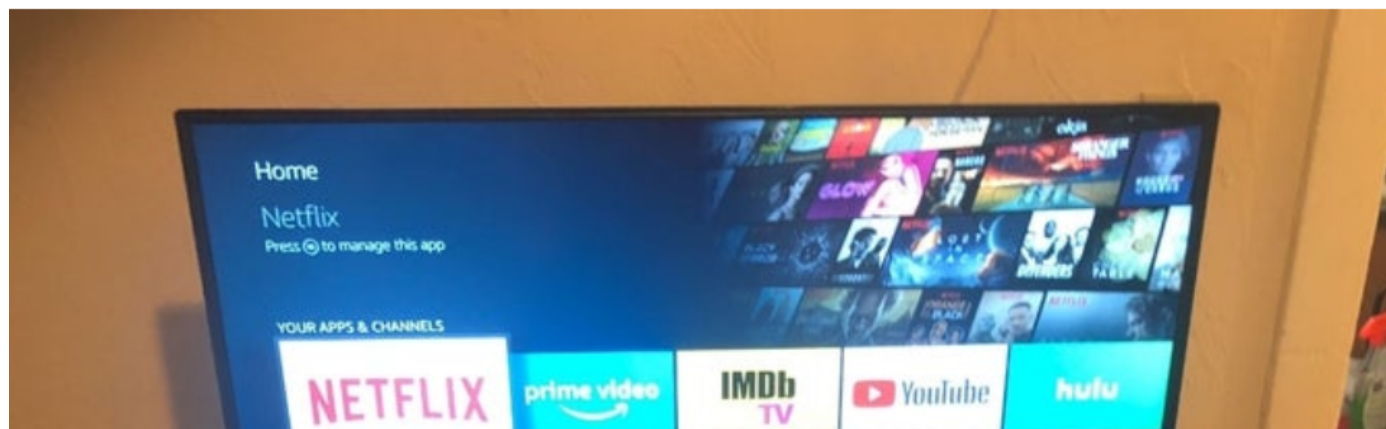
Aug 2, 2019 11:43 am ET | Updated Aug 2, 2019 5:27 pm ET

Like 220

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Repl



<https://patch.com/massachusetts/dedham/massachusetts-considers-fees-tv-streaming-giants>





## 830 CMR 64H.1.3: Computer Industry Services and Products

### (3) General Rules

---

(a) *Sales Tax.* Sales in Massachusetts of computer hardware, computer equipment, and prewritten computer software, regardless of the method of delivery, and reports of standard information in tangible form are generally subject to the Massachusetts sales tax. Taxable transfers of prewritten software include sales effected in any of the following ways regardless of the method of delivery, including electronic delivery or load and leave: licenses and leases, transfers of rights to use software installed on a remote server, upgrades, and license upgrades. The vendor collects sales tax from the purchaser and pays the sales tax to the Commissioner.

<https://www.mass.gov/regulations/830-CMR-64h13-computer-industry-services-and-products>





## TIR 05-8: Taxation of Internet Access, Electronic Commerce and Telecommunications Services: Recent Federal Legislation

<https://www.mass.gov/technical-information-release/tir-05-8-taxation-of-internet-access-electronic-commerce-and>



# TIR 09-14: Taxation of Direct Broadcast Satellite Service

Recently enacted legislation establishes a 5% excise on the gross revenues of a provider from the sale of direct broadcast satellite service to a subscriber or customer in Massachusetts. The excise applies to actual receipts on or after August 1, 2009, with the adjustments described in Section III of this TIR. See G.L. c. 64M as added by St. 2009, c. 27, §§ 61, 150. The excise will be passed along to those subscribers or customers as a separately stated item on their bills. This TIR provides guidance concerning this new tax, including filing requirements for providers.

"Direct broadcast satellite service" is defined as "the distribution or broadcasting by satellite of video programming or services directly to receiving equipment located at an end user subscriber's or an end user customer's premises, including, but not limited to, the provision of premium channels, the provision of music or other audio services or channels, and any other service received in connection with the provision of direct broadcast satellite service." The excise applies to satellite video programming services, including subscription fees for related services such as on-screen programming features and enhanced recording and playback abilities. The excise does not apply to satellite radio sold without video programming. Except as provided in Section III of this TIR, the entire revenues of a provider from satellite video programming services are subject to chapter 64M tax, regardless of whether the provider separately states a charge for one or more audio components of that service.

<https://www.mass.gov/technical-information-release/tir-09-14-taxation-of-direct-broadcast-satellite-service>



# Massachusetts

- [Preliminary Revenue Total \\$25.625 Billion](#) (sales tax)
- [Annual Report](#)
- Sales revenue (in billion): **\$6.454**
- Population (in million): **6.902**
- Per capita sales tax: **935**
- Boston
- Democratic
- Ense petit placidam sub libertate quietem (By the sword we seek peace, but peace only under liberty)



# Maine

- “Tangible personal property” includes any computer software that is not a custom computer software program, and any “product transferred electronically.”
- The electronic transfer term is not broadly construed.
  - The sale of a digital copy of a publication is taxable provided the publication is downloadable to the subscriber’s electronic device. If the subscriber is allowed only to access and view an online version of the publication and the digital copy may not be downloaded, the subscription is not taxable."
- Cable, satellite and radio are taxable services.
- [\*Measurex Systems, Inc. v. State Tax\*](#), 490 A.2d 1192 (Maine 1985)(tax authority wins; canned software is tangible personal property)

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
ME	Exempt.	Taxable if “canned.”	Taxable.	No guidance.	Taxable.	Taxable.



# Maine

## MAINE REVENUE SERVICE SALES, FUEL & SPECIAL TAX DIVISION



### A REFERENCE GUIDE TO THE SALES AND USE TAX LAW

Prepared by the  
Sales, Fuel & Special Tax Division

October 2018  
21st Edition

<https://www.maine.gov/revenue/salesuse/salestax/referenceguide/Referenceguide2018.pdf>



# Maine

## PRODUCT TRANSFERRED ELECTRONICALLY

“Product transferred electronically” is defined as follows:

“Product transferred electronically” means a digital product transferred to the purchaser electronically the sale of which in nondigital physical form would be subject to tax under this Part as a sale of tangible personal property.  
[§ 1752(9-E)]

The sale of a digital product is subject to the general rate of tax if the nondigital physical form would be subject to sales tax. For instance, the sale of digital music, books, magazines, newspapers, and movies are taxable since the sale of a CD, paper-bound book, DVD, and printed magazines and newspapers are taxable.

A product transferred electronically is sold in this State if: the product is delivered electronically to a purchaser located in this State, the product is received by the purchaser at the seller's location in this State, a Maine billing address is provided by the purchaser in connection with the transaction or a Maine billing address is indicated in the seller's business records.  
[§ 1811, last ¶]

The sale of a digital copy of a publication is taxable provided the publication is downloadable to the subscriber's electronic device. If the subscriber is allowed only to access and view an online version of the publication and the digital copy may not be downloaded, the subscription is not taxable.

When the location where the digital publication is being downloaded is unknown, the subscriber's billing address determines whether the sale occurs in Maine or not. If the billing address is in Maine, the subscription is treated as taxable.

<https://www.maine.gov/revenue/salesuse/salestax/referenceguide/Referenceguide2018.pdf>





## MAINE REVENUE SERVICES

SALES, FUEL & SPECIAL TAX DIVISION  
GENERAL INFORMATION BULLETIN

June 1, 2014

NO. 104

### OTHER LEGISLATIVE CHANGES PRODUCTS TRANSFERRED ELECTRONICALLY 36 M.R.S. § 1752(17)

*Sales* of products transferred electronically are subject to sales tax. A “product transferred electronically” is a digital product transferred to the purchaser electronically that would otherwise be taxable as a sale of tangible personal property had it been transferred in a physical format. Maine law was amended during the last legislative session by Chapter 368 to clarify the longstanding Maine Revenue Services interpretation of the sales tax law that a product is subject to sales tax, whether provided to the customer in a tangible or electronic form. For

example, a paperback book and an e-book are treated the same for sales tax purposes. The law was further amended this legislative session to clarify that “tangible personal property” includes a product transferred electronically. (*P. L. 2013 c. 546*)

<https://www.maine.gov/revenue/salesuse/GIB104070114.pdf>



# Maine

- [Comprehensive Annual Financial Report](#)
- Sales revenue (in billion): **\$1.57**
- Population (in million): **1.338**
- Per capita sales tax: **1173**
- Augusta
- Democratic
- Dirigo (I lead)





# Maryland

- Narrow definition of TPP (corporeal). The sale of canned software products is subject to tax if it is accessed by physical medium such as a CD-ROM, load-and-leave software, etc.
  - Maryland lists digital products the sale of which is not subject to sales and use tax: ▪ Canned computer software accessed electronically through digital download etc. ▪ Mobile applications (apps); in-app purchases ▪ Satellite Radio Services and Subscriptions ▪ Software as a Service ▪ Video and audio including downloads, subscriptions and streaming services ▪ Video games, accessed electronically through downloads, subscriptions and streaming services. However, pay per view television service is taxable. MD Tax 11-101(m)(8).
- Maryland only taxes software delivered on tangible medium, does not specifically address digital goods, and only canned software delivered on tangible media is subject to tax.
- [\*Comptroller of the Treasury v. Equitable Trust Co.\*](#), 296 Md. 459 (App. 1983)(tax authority wins, software - tangible, taxability should not turn on whether the buyer stores program in memory, or may have been structured in nontaxable form)

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
MD	Exempt.	Exempt. Downloaded software is taxable if customer receives a hard copy.	Taxable.	There is no guidance issued on SaaS.	Exempt.	Not taxable.



# Maryland

## LIST OF TANGIBLE PERSONAL PROPERTY AND SERVICES SUBJECT TO SALES AND USE TAX

Sales and use tax does not apply to the sale of a digital product unless the buyer has the right to receive tangible personal property. The following is a list of digital products the sale of which is not subject to sales and use tax:

- Canned computer software accessed electronically through digital download etc.
- Mobile applications (apps); in-app purchases
- Satellite Radio Services and Subscriptions
- Software as a Service
- Video and audio including downloads, subscriptions and streaming services
- Video games, accessed electronically through downloads, subscriptions and streaming services

[https://marylandtaxes.gov/forms/Tax\\_Publications/Sales\\_and\\_Use\\_Tax%20-List\\_of\\_TPP\\_and\\_Services.pdf](https://marylandtaxes.gov/forms/Tax_Publications/Sales_and_Use_Tax%20-List_of_TPP_and_Services.pdf)



# Maryland

- [Annual Report](#)
- **Population (in million):**                      **6.042**
- Annapolis
- Democratic
- Fatti maschii, parole femine (Manly deeds, womanly words)



# Michigan (SSUTA)

- “Tangible personal property” is defined to include prewritten software, which is taxable if delivered electronically. MI ST 205.51a(r).
  - The term “delivered electronically” is literally construed to mean the transfer of the software code, according to *Auto-Owners Ins.*
- Software accessible via cloud is not taxable. SaaS is non-taxable in Michigan.
- The term “prewritten computer software” is elaborately defined to include prewritten upgrades etc. MI ST 205.92 (p).
- Michigan did not adopt definition of specified digital goods and, therefore, does not tax delivery of digital content like audio/video content.
- See [Auto-Owners Ins. Co. v. Dep’t of Treasury](#), 880 N.W.2d 337 (Mich. App. 2015) (taxpayer wins; no transfer of control incident to ownership); [Thomson Reuters Inc. v. Department of Treasury](#), 2014 WL 1921257 (App. 2015) (taxpayer wins; primary purpose – transfer of information services); [Maccabees Mutual Life Ins. Co. v. Dep’t of Treasury](#), 122 Mich. App. 660 (1983)(taxpayer wins; expert witness supported that software was customized).

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
MI	Exempt.	Taxable.	Taxable.	Not taxable. The COA held that cloud computing are not subject to the use tax. Inconsistent regulations.	Exempt.	Not taxable. However, if charges for nontaxable telecommunications are aggregated and not separately stated from charges for taxable services – taxable.



# Michigan (SSUTA)

Rev. 4-15)



STATE OF MICHIGAN  
DEPARTMENT OF TREASURY  
LANSING

GRETCHEN WHITMER  
GOVERNOR

RACHAEL EUBANKS  
STATE TREASURER

[https://www.michigan.gov/documents/taxes/SalesUseTax-TreatmentOfSoftwareProduct\\_668336\\_7.pdf](https://www.michigan.gov/documents/taxes/SalesUseTax-TreatmentOfSoftwareProduct_668336_7.pdf)



# Michigan (SSUTA)

In *Auto-Owners Ins Co v Dep't of Treasury*,<sup>6</sup> the Michigan Court of Appeals reviewed two types of software products to determine if they constituted taxable “prewritten computer software.” The first type of software consisted of products that did not include the delivery of code that enabled the system to operate. These products did not satisfy the requirement that prewritten computer software must be delivered, in any manner. Rather, the user merely accessed the software that was hosted on a third-party server through a website. The court held that this type of software was not “used” for purposes of the Use Tax Act’s definition of “use” because the taxpayer did not exercise “a right or power over the code incident to the ownership of that code...”<sup>7</sup>

The second type of software *Auto-Owners* addressed were products where some prewritten computer software was electronically delivered to the user (i.e., a local client or desktop agent). The court held that the desktop agent constituted the delivery and use of prewritten computer software. However, the court determined that the software was merely incidental to the vendor’s professional services. Therefore, it applied the incidental to the service test to determine if the entire transaction was taxable or not.<sup>8</sup>




# Michigan (SSUTA)

- [Annual Report](#)
- Sales revenue (in billion): \$10.6
- Population (in million): 9.995
- Per capita sales tax: 1061
- Lansing
- D/R
- Si quaeris peninsulam amoenam circumspice (If you seek a pleasant peninsula, look about you)



# Minnesota (SSUTA)

- Minnesota taxes prewritten computer software but not SaaS. Minnesota also taxes digital products accessed online.
  - In its online guide, Minnesota chose to clarify that online hosted software accessed through the internet is not taxable. However, this is not the case with Specified Digital Products (videos, etc.) - those are deemed taxable when they are "transferred electronically" and not just "delivered electronically," as the term "transferred electronically" includes the ability to access. As such, streaming digital content appears taxable, but not access to software in the cloud. Also, per Sales Tax Fact Sheet 199, "Pay television service is taxable. Beginning July 1, 2013, pay television service replaces the terms cable television service and direct satellite service. Pay television service includes all "pay" television services regardless if delivery is via cable, direct satellite, or otherwise.
- See [\*Lumidata v. Commissioner of Revenue\*](#), 2013 WL 6834796 (Minn. Tax 2013) (tax authority wins; no evidence of "magnitude of alleged custom programming costs"; taxpayer fails to prove exempt costs for customization in bundled invoices)

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
MN	Exempt.	Taxable.	Taxable. However, qualified software sold by schools to students is not subject to tax.	No guidance. However, Minnesota law provides that the transfer of prewritten computer software for consideration whether delivered electronically, by load and leave or otherwise, is taxable.	Taxable.	Taxable. Pay television service is taxable regardless of whether delivery is via cable, direct satellite or otherwise. The term "pay television service" replaces the terms cable or satellite. 





# Minnesota (SSUTA)



[Individuals](#) [Businesses](#) [Tax Professionals](#) [Governments](#) [Policy & Research](#) [Fraud](#)

SEARCH THIS GUIDE

## Computer Software and Digital Products

Prewritten Computer Software	[+]
Custom Software	[+]
Online Hosted Software	[+]
Digital Products	[+]

<https://www.revenue.state.mn.us/guide/computer-software-and-digital-products>



# Minnesota (SSUTA)

## Prewritten Computer Software [-

Prewritten computer software is the sale, lease, or license to use a canned or prewritten computer software program. Prewritten computer software is taxable.

For more information, see [Computer Software](#).

## Custom Software [-

Custom software is a program created for the needs of a specific customer. It generally requires a consultation and analysis of the customer's requirements. Fees charged for custom software are not taxable.

<https://www.revenue.state.mn.us/guide/computer-software-and-digital-products>



## Online Hosted Software

[-]

Online hosted software is software where users do not take any ownership or possession of the software. Online hosted software is:

- accessed through the Internet
- installed at and hosted from a remote server or location
- owned by the software manufacturer or third-party vendor

Subscriptions to use online-hosted software are not taxable. Charges for maintenance or upgrades to online hosting software are not taxable, even if separately stated.



# Minnesota (SSUTA)

## Digital Products

[–]

Digital products are products provided to a customer electronically. Usually, a customer is given access to the product through the Internet or email.

Taxable digital products include:

- Digital audio works (music, audio books, ring tones)
- Digital audiovisual works (movies, music videos)
- Digital books
- Digital codes that give a purchaser access to taxable digital products
- E-Greeting cards
- Online video or computer gaming

Nontaxable digital products include:

- Access to digital news articles
- Charts and graphs
- Data or financial reports
- Digital photos and drawings

<https://www.revenue.state.mn.us/guide/computer-software-and-digital-products>



# Minnesota (SSUTA)

- [Annual Reports](#)
- **Sales revenue (in billion):**                      **\$5.611**
- **Population (in million):**
- **Per capita sales tax:**
- Saint Paul
- Democratic
- L'Étoile du Nord (The Star of the North)



# Missouri

- Missouri only taxes canned software sold in tangible medium. No taxation on digital goods otherwise.
- SaaS is non-taxable in Missouri. 12 CSR 10-109 ("The sale of software as a service is not subject to tax. The service provider must pay sales or use tax on any tangible personal property used to provide the service that is purchased or used in Missouri.")
- [\*Int'l Business Machines Corp. v. Missouri\*](#), 765 S.W. 2d 611 (Mo. 1989)(tax authority wins; no evidence software was service)
- [\*James v. Tres Computer Systems, Inc.\*](#), 642 S.W.2d 347 (Mo. 1982) (taxpayer wins, the data and programs were intangible, not followed in IBM v. Director of Rev. (Mo. 1989))

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
MO	Exempt. The transaction is exempt if the true object or essence of the transaction is the provision of technical professional service.	Exempt.	Taxable.	Not taxable.	Exempt.	Not taxable.



## (2) Definition of Terms.

(A) Canned software—software purchased “off the shelf” or of general application developed for sale to and use by many different customers with little or no modification. This may include software developed for in-house use and subsequently held or offered for sale or license. Software may be canned even if it requires some modification, adaptation, or testing to meet the customer’s particular needs.

(B) Customized software—software developed to the special order of a customer. The true object sought by a purchaser of customized software is the service of the seller and not the property produced by the service of the seller. Note that minor changes to canned software will not be sufficient to qualify as custom software. Further, software that is unique to a special industry will not be sufficient to qualify as custom software. Additionally, software that is sold in modules will not qualify as custom software.

(C) Software as a service—A model for enabling ubiquitous, convenient, and on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction. The term includes platform as a service model, infrastructure as a service model, and similar service models. It does not include any service model that gives the purchaser the right to use specifically identified tangible personal property.

# Missouri

(A) Tax applies to the sale of canned software delivered in a tangible medium to the purchaser. Examples of canned software delivered in a tangible medium would include coding sheets, cards, magnetic tape, CD-ROM, or other tangible electronic distribution media on which or into which canned software has been coded, punched, or otherwise recorded.

(I) The sale of software as a service is not subject to tax. The service provider must pay sales or use tax on any tangible personal property used to provide the service that is purchased or used in Missouri.





AUGUST 06, 2019 5:18pm PT by Eriq Gardner

## Netflix Sent to State Court to Fight Missouri Cities on Fees



# Missouri

- In 2018, Creve Coeur filed a class action on behalf of itself and other cities in Missouri with the allegation that Netflix and Hulu were shirking their fee obligations. Subsequently, Netflix and Hulu had the case removed to federal court.
- In arguing against the fees, the streamers [pointed to Missouri's passage in 2007 of the Video Services Providers Act](#).
- "Netflix does not provide video programming," argued the streaming giant. "But even if Netflix did provide video programming, such programming is specifically excluded from the definition of video service when provided through the public Internet. The Act, and Creve Coeur's ordinance, state that the definition of video service 'does not include... any video programming provided solely as part of and via a service that enables users to access content, information, electronic mail, or other services offered over the public Internet.' This exclusion describes the Netflix Streaming Service exactly."
- Netflix would surely prefer to appear in federal court to argue that local municipalities are unfairly attempting to impose fees on a global digital service.
- Unfortunately for the company, U.S. District Court Judge Ronnie White refuses to exercise jurisdiction under the Class Action Fairness Act, despite at least 100 municipalities in Missouri with a stake in the outcome. Creve Coeur argued that the doctrine of comity required the federal court back off on state taxation of commercial activity.
- "This case is on all fours with *Maryland Heights*," writes White referring to a past class action from a Missouri municipality seeking relief against a telephone service provider related to collection of local tax ordinances. "First, both Satellite Defendants and Streaming Defendants, by removing these cases, have invited 'federal-court review of commercial matters over which [Missouri and Missouri municipalities] enjoy wide regulatory latitude.' Second, the state court will be a better forum for certain defenses related to application of Missouri law and the Missouri Constitution because '[w]ithout question the state court is more familiar with Missouri's tax laws and the intent of the Missouri legislature.' Finally, Missouri courts are in a better position than this Court to rule on any potential constitutional violation 'because they are more familiar with state legislative preferences and because the TIA [Tax Injunction Act] does not constrain their remedial options.'"
- In the order ([read here](#)), White has consolidated the lawsuits against the satellite operators (DirecTV and Dish) with the streamers (Netflix and Hulu) and set up a battle in local court over these fees. The decision comes just as [the FCC voted to limit](#) how local governments may collect franchise fees. The FCC's rule changes figure to spark a separate battle.



# Missouri

- [Financial and Statistical Report](#)
- **Sales revenue (in billion):** **\$7**
- **Population (in million):** **6.126**
- **Per capita sales tax:** **1191**
- Jefferson City
- Republican
- Salus populi suprema lex esto (By valor and arms)



# Mississippi

- Lengthy definition of TPP that refers to not merely being "perceptible to the human senses" but also to "chemical analysis."
  - Mississippi does not distinguish between the types of software.
  - Mississippi taxes software and specified digital products.
    - *From the statutes it is not clear if the tax on software and specified digital products only if obtained electronically, not accessed, i.e., downloaded.*
  - *MS ST § 27-65-19(d)(5) (tax applies to "products delivered electronically, including, but not limited to, software, music, games, reading materials or ring tones"). In its rules, Mississippi also establishes a broader coverage for specified digital products.*
- Yet, SaaS is non-taxable in Mississippi (electronic delivery does not include access).  
("However, software maintained on a server located outside the state and accessible for use only via the Internet is not taxable.")

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
MS	Taxable. Sales of software transmitted by Internet to a destination outside the state where the first use occurs are exempt.	Taxable.	Taxable.	Taxable. (?)	Taxable.	Taxable.



# Mississippi

## 101 Computer Program and Software

1. a. "Computer Program" is a series of instructions that are coded for acceptance or use by a computer system which are designed to permit the computer system to process data and provide results and information. The series of instruction may be contained in or on magnetic tapes, printed instructions, or other tangible or electronic media or downloaded via the Internet. This definition includes computer game cartridges which allow certain games to be played on a television set through interaction with a computer or on home computers.
- b. "Computer Software" is a collection of computer programs which work in cooperation with one another to perform automated tasks.
2. Rate and Application of the Tax
  - a. The gross income received from computer program or software sales and services is taxable at the regular retail rate of sales tax. Computer program license fees (one-time or annual) and/or maintenance contract income are taxable regardless of how billed. Taxable services also include the design and creation of a web page regardless of the location of the hosting server.

### Professional Services

- 200 Professional Services. Professional services directly related to the technical design and programming of computer software are taxable and are included in gross taxable income.

<https://www.dor.ms.gov/Laws-Rules/Documents/Part%20IV%20Sales%20and%20Use%20Tax.pdf>



# Mississippi

## Professional Services

- 200 Professional Services. Professional services directly related to the technical design and programming of computer software are taxable and are included in gross taxable income.

## Use Tax

- 300 Use Tax. Section 27-67-3(i), defines computer software programs as tangible personal property for use tax purposes. The regular rate of use tax is due and payable from every person using, storing, or consuming such property within this state, possession of which is acquired in any manner. However, software maintained on a server located outside the state and accessible for use only via the Internet is not taxable.

<https://www.dor.ms.gov/Laws-Rules/Documents/Part%20IV%20Sales%20and%20Use%20Tax.pdf>





# Mississippi

*35.IV.04.09 revised effective April 1, 2018.*

## **Chapter 10 Specified Digital Products**

- 100 The sale, rental or lease of specified digital products is taxed at the regular retail rate when:
1. The sale, rental or lease is to an end user;
  2. The seller conveys the right of permanent or less than permanent use of the products transferred electronically; or
  3. The sale is conditioned or not conditioned on continued payment.
- 101 The sale of a digital code that allows the purchaser to obtain a specified digital product is taxed in the same manner as a specified digital product.
- 102 “Specified digital products” are electronically transferred digital audio-visual works, digital audio works and digital books. A person is in the business of selling, leasing or renting specified digital products in Mississippi if the product is electronically transferred to a purchaser located in Mississippi. A product is “electronically transferred” when it is obtained by the purchaser by some means other than tangible storage media, including, but not limited to, delivery via internet or network, or access via internet or network to a server where the product is stored, regardless of the location of the server.

<https://www.dor.ms.gov/Laws-Rules/Documents/Part%20IV%20Sales%20and%20Use%20Tax.pdf>



# Mississippi

- [Annual Reports](#)
- **Sales revenue (in billion):** **\$3.3**
- **Population (in million):** **2.986**
- **Per capita sales tax:** **1105**
- Jackson
- Republican
- Virtute et Armis (By Valor and Arms)









# Nebraska (SSUTA)

- Nebraska expressly taxes “intellectual property” and “entertainment property.”
  - The definition of TPP is narrow and only includes property that has a physical existence or form.
  - Nebraska does not differentiate between customized and prewritten software, similar to a handful of other states.
- SaaS is not expressly addressed in the statutes, but based on the broad taxability, SaaS must also be taxable because the tax is on the act of furnishing of the properties of software to the buyer (no mention as to how the software is delivered) as long as the properties are made available and furnished.
- Separately, Nebraska specifically taxes digital goods when delivered on tangible storage media. The services of community antenna television service operator, or as a satellite service operator are also taxable and treated as those of a public utility.

	Custom Computer Software	Download Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
NE	Taxable	Taxable	Taxable.	Not taxable.	Taxable.	Taxable.



# Nebraska (SSUTA)

-  **Charge Card Expenses by C.O. (Federal) Employees** (11/2018)
-  **Common or Contract Carrier** (08/2018)
- **Computer Software** (this guide is being updated)
-  **Construction Contractor Fact Sheet** (04/2015) - legal-size
-  **Consumer's Use Tax** (03/2009 - contains information updated 12/2011)

<https://revenue.nebraska.gov/about/information-guides/sales-and-use-tax-information-guides>



# Nebraska (SSUTA)

## REG-1-088, Computer Software

088.01 The gross receipts from furnishing software regardless of the manner in which it is conveyed are taxable.

088.01A The gross receipts from furnishing software includes services provided by a consultant that result in a transfer of software from the consultant to the client.

088.02 Charges for customer training are taxable whenever paid to the retailer of the software. Charges for training that are paid to a person other than the retailer of the software are exempt.

088.03 Charges for consultants who only provide generalized advice and who do not provide any software or modifications to software are exempt.

088.04 Software that alters existing software is considered separate from the existing software and is taxable.

088.05 Charges for agreements which require the seller, without additional charge or at a reduced price, to provide future enhancements, changes, or modifications, are taxable.

088.06 Computer software is a sequence of instructions which directs the computer to process either digital or analog data. Software does not include data such as mailing lists, even when in machine-readable form, or charges for converting data into machine-usable form. For the taxability of lists see Reg-1-080, Documents.

*(Sections 77-2701.39, R.R.S. 2003, and sections 77-2701.16, 77-2701.35, 77-2703(1), and , 77-2703.01, R.S.Supp., 2008. February 22, 2009.)*

<https://revenue.nebraska.gov/sites/revenue.nebraska.gov/files/doc/legal/regs/1-088.pdf>



# Nebraska (SSUTA)

## Computer Software Maintenance Agreements

Charges for maintenance agreements to maintain computer software that include free or reduced-price upgrades, enhancements, changes, modifications, or updates are taxable.

**Example 2.** A computer software company sells a software program to a customer for \$10,000. The company also sells an annual maintenance agreement for \$1,000. The maintenance agreement provides the customer, at no additional charge, with:

- Updates and enhancements to the software to increase operating speed and operating efficiency;
- Correction of inherent material errors in the software program; and
- Installation of any new release of the software.

The selling price of \$10,000 for the software program is taxable. In addition, the selling price of the maintenance agreement of \$1,000 is taxable.

<https://revenue.nebraska.gov/sites/revenue.nebraska.gov/files/doc/info/6-516.pdf>



# Nebraska (SSUTA)

As provided in [Revenue Ruling 01-11-3](#), sales of products defined as “digital audio-visual works” are subject to tax when sold to the end user. Digital audio-visual works is defined as a series of images which, when shown in succession, impart an impression of motion. Included within the definition are videos, news and other television programs, and live events. Therefore, sales of both Internet protocol television and streaming video services are subject to tax as the sale of digital audio-visual works. Such sales are subject to tax when delivered or transferred to servers or other electronic devices in Nebraska.

The sale of digital audio-visual works is taxable whether the purchaser receives a permanent or temporary right of use. Persons operating under a certificate from the FCC with the right or license to rebroadcast the digital audiovisual work to the general public by television or other means are not considered an “end user” and may purchase the item for resale.

[https://revenue.nebraska.gov/sites/revenue.nebraska.gov/files/doc/legal/gil/GIL01-16-01\\_Internet\\_TV.pdf](https://revenue.nebraska.gov/sites/revenue.nebraska.gov/files/doc/legal/gil/GIL01-16-01_Internet_TV.pdf)



# Nebraska (SSUTA)

- [Sales Tax Data](#)
- [Annual Report](#)
- **Sales revenue (in billion):** **\$1.7**
- **Population (in million):** **1.929**
- **Per capita sales tax:** **881**
- Lincoln
- Republican
- Equality Before the Law.



# Nevada (SSUTA)

- Nevada does not tax products delivered electronically as they are not considered tangible personal property.
- Nevada taxes hosting and data processing services.
- It has separate sections for custom and prewritten computer software (PCS). However, unless the PCS is delivered electronically or via load and leave, it is tangible personal property.
- Specified digital products are separate from TPP (specifically excluded) and therefore not taxed.

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
NV	Exempt.	Exempt as long as no TPP is exchanged.	Taxable.	Not taxable. NV has not issued specific guidance on the taxation of cloud computing or SaaS.	Exempt.	Not taxable. NV sales and use tax does not apply to activities that are directly related to the transmission of radio, tv, cable tv, or data signals, incl. news or information by data signal, etc.





# Nevada (SSUTA)

Is software, electronic magazines, clipart, program code, or other downloaded material taxable to Nevada residents?

No. Products delivered electronically or by load and leave are not subject to Nevada Sales or Use Tax. However, products ordered via the internet and shipped into Nevada are taxable, as well as any software transferred via a disk or other tangible media. A box of software or other product shipped to customers in this state is physical, tangible personal property and subject to sales tax.

[https://tax.nv.gov/FAQs/Sales\\_Tax\\_Information\\_\\_FAQ\\_s/](https://tax.nv.gov/FAQs/Sales_Tax_Information__FAQ_s/)





# Nevada (SSUTA)

372.880. Applicability of tax to prewritten computer software and computer software maintenance contracts. (NRS 360.090, 360B.110, 372.725), NV ADC 372.880 --**1. Unless it is delivered electronically or by load and leave, prewritten computer software is tangible personal property.** The tax applies to:

- (a) The sale, lease, rental or licensing for use of such prewritten computer software.
- (b) A mandatory computer software maintenance contract for such prewritten computer software.
- (c) An optional computer software maintenance contract for such prewritten computer software which obligates the vendor to provide future updates or upgrades to the prewritten computer software. Except as otherwise provided in subsection 2, the tax does not apply to an optional computer software maintenance contract for such prewritten computer software which only obligates the vendor to provide support services.

2. If an optional computer software maintenance contract is part of a bundled transaction which includes both taxable and nontaxable or exempt products that are not separately itemized on the invoice or similar billing document, the tax applies to the entire transaction.

3. For the purposes of this section:

- (a) “Bundled transaction” has the meaning ascribed to it in NAC 372.045.
- (b) “Computer software maintenance contract” means a contract that obligates a vendor of prewritten computer software to provide a customer with future updates or upgrades to prewritten computer software, support services with respect to prewritten computer software, or both.
- (c) “Mandatory computer software maintenance contract” means a computer software maintenance contract that a customer is obligated by contract to purchase as a condition to the retail sale of prewritten computer software.
- (d) “Optional computer software maintenance contract” means a computer software maintenance contract that a customer is not obligated to purchase as a condition to the retail sale of prewritten computer software.



# Nevada (SSUTA)

## **NRS 363C.430 Publishing, software and data processing (NAICS 511, 512, 515 and 518).**

1. The publishing, software and data processing business category (NAICS 511, 512, 515 and 518) includes all business entities primarily engaged in: (a) Publishing, except on the Internet, including, without limitation, the publishing of newspapers, magazines, other periodicals and books, as well as directory and mailing list and software publishing; (b) Motion picture and sound recording, including, without limitation, the production and distribution of motion pictures and sound recordings; (c) Broadcasting, except on the Internet, including, without limitation, creating content or acquiring the right to distribute content and subsequently broadcast the content; and (d) Data processing, hosting and related services, including, without limitation, the provision of infrastructure for hosting and data processing services.

2. The amount of the commerce tax for a business entity included in this category is the amount obtained by subtracting \$4,000,000 from the Nevada gross revenue of the business entity for the taxable year and multiplying that amount by 0.253 percent.

(Added to NRS by 2015, 2892)



# Nevada (SSUTA)

- [Annual Report](#)
- **Sales revenue (in billion):** **\$4.675**
- **Population (in million):** **3.034**
- **Per capita sales tax:** **1541**
- Carson City
- Democratic
- All For Our Country



# New Jersey (SSUTA)

- The definition of tangible personal property includes prewritten computer software delivered electronically. N.J.S.A. 54:32B-2(g).
- Receipts from sales of a specified digital product that is accessed but not delivered electronically to the purchaser are exempt from tax.
  - Nor is tax imposed on other types of property that are delivered electronically, such as digital photographs, digital magazines, etc. Services delivered into New Jersey are taxable when they are specifically listed under N.J.S.A. 54:32B-3.
  - Use of a software application is not listed as a taxable service. However, SaaS which meets the definition of an information service is subject to Sales Tax. Charges for SaaS where the software is accessed and used as a tool for providing information to customers by an information service provider are sales of information services.
- See [\*Premier Netcomm Solutions, L.L.C. v. Director\*, 2017 WL 113941, at \\*1 \(N.J.Tax, 2017\)](#) (tax authority wins, the issue is of the scope/application of bulletins); [\*Spencer Gifts, Inc. v. Director\*](#), 182 N. J. Super. 179 (N.J. 1981)(taxpayer wins, tapes incidental to leasing information were not taxable)

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
NJ	Exempt.	Taxable. Exemption available for software that is exclusively for business use that is delivered electronically.	Taxable.	Not taxable.	Taxable.	Not taxable.



# New Jersey (SSUTA)

About New Jersey Taxes



## Specified Digital Products & New Jersey Sales Tax

Publication ANJ-27

"Specified digital product" means an electronically transferred digital audio-visual work, digital audio work, or digital book. A digital code which provides a purchaser with a right to obtain the product is treated in the same manner as a specified digital product. Transferred electronically means obtained by the purchaser by means other than tangible storage media.

Sales Tax is imposed on receipts from the sale of the specified digital products listed above. The products identified as specified digital products are also subject to Sales Tax when delivered in tangible form (e.g., CD, DVD, audio/video tape). Receipts from sales of a specified digital product that is accessed but not delivered electronically to the purchaser are exempt from tax. Nor is tax imposed on other types of property that are delivered electronically, such as digital photographs, digital magazines, etc. For additional information regarding digital photographs, see [ANJ-2](#), *Professional Photographers*.

Although a product delivered electronically may not be a specified digital product, tax may be imposed under other sections of the Sales and Use Tax Act. For example, Sales Tax is imposed on "information services" provided through any means or method. Products such as mailing lists are treated as information services and are taxable whether delivered electronically or in hard copy. Although a mailing list delivered electronically is not a specified digital product, it is subject to tax as an information service. Specified digital products are also subject to the compensating Use Tax. For more information, see [ANJ-7](#), *Use Tax in New Jersey* and [ANJ-10](#), *Out-of-State Sales and New Jersey Sales Tax*.

<https://www.state.nj.us/treasury/taxation/pdf/pubs/sales/anj27.pdf>



# New Jersey (SSUTA)



About New Jersey Taxes

## Information Services & New Jersey Sales Tax

Publication ANJ-29

A business which *charges a fee for access* to any type of information other than personal or individual information (e.g., stock quotes, financial, legal research, property values, and marketing trends) through any means (e.g., an electronic database, subscription to a hard copy report) is selling an information service, because the true object of that transaction is the information itself. As such, these transactions are subject to tax.

<https://www.state.nj.us/treasury/taxation/pdf/pubs/sales/anj29.pdf>





# New Jersey (SSUTA)



## Cloud Computing (SaaS, PaaS, IaaS)

TB-72 – Issued July 3, 2013  
Tax: Sales and Use Tax

### **SAAS IS NOT THE SALE OF TANGIBLE PROPERTY**

The definition of tangible personal property includes prewritten computer software delivered electronically. N.J.S.A. 54:32B-2(g). Because SaaS only provides the customer with access to the software and the software is not “delivered electronically,” it is not the sale of tangible personal property.

SaaS providers fully retain and operate the software applications to which they sell access.

Customers only have access to the software through remote means. SaaS customers do not receive title or take possession of the software. The SaaS provider uses the software it owns or licenses to provide the service and does not transfer the software to its customers. An SaaS provider is not treated as a reseller of a license to use the software. Therefore, the sale of SaaS is not a sale of tangible personal property. Rather it is the sale of a service. N.J.S.A. 54:32B-3(a); N.J.S.A. 54:32B-2(f).

<https://www.state.nj.us/treasury/taxation/pdf/pubs/tb/tb72.pdf>



# New Jersey (SSUTA)



## Cloud Computing (SaaS, PaaS, IaaS)

TB-72 – Issued July 3, 2013  
Tax: Sales and Use Tax

### **IS THE SALE OF SAAS THE SALE OF AN ENUMERATED SERVICE?**

Services delivered into New Jersey are taxable when they are specifically listed under N.J.S.A. 54:32B-3. Use of a software application is not listed as a taxable service. Therefore, most charges for SaaS are not subject to Sales Tax. However, SaaS which meets the definition of an information service is subject to Sales Tax. Charges for SaaS where the software is accessed and used as a tool for providing information to customers by an information service provider are sales of information services.

The law defines information services as "the furnishing of information of any kind, which has been collected, compiled, or analyzed by the seller, and provided through any means or method, other than personal or individual information which is not incorporated into reports furnished to other people." N.J.S.A. 54:32B-3(b)(12). Some common examples of taxable information services which are conveyed through SaaS are Westlaw, LexisNexis, CCH, and RIA.

<https://www.state.nj.us/treasury/taxation/pdf/pubs/tb/tb72.pdf>





# New Jersey (SSUTA)

- [Comprehensive Annual Financial Report](#)
- **Sales revenue (in billion):**                      **\$9.7**
- **Population (in million):**                      **8.908**
- **Per capita sales tax:**                      **1089**
- Trenton
- Democratic
- Liberty and Prosperity



# New Mexico

- New Mexico taxes TPP and most services. Digital goods are not specifically addressed.
- Per recent internet publications, “SaaS and cloud computing are considered taxable services in New Mexico and are subject to New Mexico’s gross receipts tax, as long as the services are used in New Mexico. In other words, the state doesn't consider the location of the servers where SaaS offerings are accessed; they only consider where services are actively being used when determining taxability.”

	Custom Computer Software	Download Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
NM	Taxable.	Taxable.	Taxable. Receipts from canned software are taxable tangible personal property.	SaaS is taxable in NM. The provision of cloud computing is a taxable license of an intangible. <i>However, receipts from providing storage capacity for data on a server located outside NM are not subject to gross receipts tax in NM.</i>	Taxable. Digital products are taxable in NM. <i>Information electronically transmitted from one computer to another is taxable as long as the seller had nexus in NM.</i>	Taxable. NM generally taxes all receipts derived from performing services in NM unless the services are specifically exempt or deductible.



# New Mexico

- [Comprehensive Annual Financial Report](#)
- Sales revenue (in billion):
- Population (in million): 2.095
- Per capita sales tax:
- Santa Fe
- Democratic
- Crescit eundo (It grows as it goes)



# New York

- **Prewritten computer software is taxable as “tangible personal property”, whether it is sold as part of a package or as a separate component, regardless of how the software is conveyed to the purchaser.**
  - Prewritten computer software is taxable whether sold: on a disk or other physical medium; by electronic transmission; or by remote access.
- **Digital products are not subject to sales tax.**

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
NY	Exempt.	Taxable.	Taxable.	Taxable.	Exempt.	Not t



## Examples of taxable tangible personal property, services, and transactions that are subject to sales tax are:

- tangible personal property:
  - furniture, appliances, and light fixtures;
  - certain clothing and footwear;
  - machinery and equipment, parts, tools, and supplies;
  - computers;
  - prewritten (canned/off-the-shelf/standard) computer software (whether transferred by CD-ROM, Internet download, remote access, etc.);
  - motor vehicles;

[https://www.tax.ny.gov/pubs\\_and\\_bulls/tg\\_bulletins/st/quick\\_reference\\_guide\\_for\\_taxable\\_and\\_exempt\\_property\\_and\\_services.htm](https://www.tax.ny.gov/pubs_and_bulls/tg_bulletins/st/quick_reference_guide_for_taxable_and_exempt_property_and_services.htm)



# New York

- [Collections Tables](#)
- **Sales revenue (in billion):** **\$14**
- **Population (in million):** **19.542**
- **Per capita sales tax:** **729**
- Albany
- Democratic
- Excelsior (Ever upward)



# North Carolina (SSUTA)

- North Carolina views access to software remotely as a service, not taxable.
- North Carolina arrives to a different conclusion with respect to digital products/content.
  - The sales and use tax is imposed on digital property if it is: 1) delivered or accessed electronically, 2) is not considered tangible personal property, and 3) would be taxable if sold in a tangible medium.
- In its Sales and Use Tax Bulletins, Subt. 84-2, North Carolina also makes clear that (a) video programming and (b) satellite digital audio radio services are taxable.

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
NC	Exempt.	Taxable. Prewritten computer software delivered electronically or via load and leave is taxable.	Taxable.	Not taxable.	Taxable.	Taxable.





## North Carolina clarifies sales tax on digital goods

INSIGHT ARTICLE | August 05, 2019

On July 26, 2019, North Carolina Gov. Roy Cooper signed [Senate Bill 523](#), providing various clarifications and changes to the state's tax law including a broadening of the sales tax base to include certain digital property.

Senate Bill 523 clarifies that the sales and use tax is imposed on "certain digital property." Certain digital property includes the following items that are 1) delivered or accessed electronically and 2) are not considered tangible personal property: audio works; audiovisual works; books, magazines, newspapers, newsletters, reports, or other publications; and photographs and greeting cards. Certain digital property does not include an information service. The prong related to considering whether the product would be taxable in a tangible medium was eliminated. The tax on certain digital property is effective Oct. 1, 2019.

<https://rsmus.com/what-we-do/services/tax/indirect-tax/sales-and-use-tax/north-carolina-clarifies-sales-tax-on-digital-goods.html>



# North Carolina (SSUTA)

## **General Information**

N.C. Gen. Stat. § 105-164.4(a)(6b) imposes a privilege tax at the general State and applicable local rates of sales and use tax on the net taxable sales or gross receipts derived from certain digital property. The following digital property is subject to tax: (1) an audio work; (2) an audiovisual work; (3) a book, a magazine, a newspaper, a newsletter, a report, or another publication; (4) a photograph or a greeting card. The general sales and use tax rate applies to digital property that is delivered or accessed electronically, is not considered tangible personal property, and would be taxable under Article 5, Sales and Use Tax, if sold in a tangible medium. The tax applies regardless of whether the purchaser of the item has the right to use it permanently or to use it without making continued payments.

<https://www.ncdor.gov/documents/important-notice-sourcing-certain-digital-property-subject-sales-and-use-tax>



# North Carolina (SSUTA)

## **SOURCING OF DIGITAL PROPERTY AND COMPUTER SOFTWARE DELIVERED ELECTRONICALLY**

This notice is to specify the sourcing provision applicable to the sale of certain digital property and computer software delivered electronically relative to provisions of N.C. Gen. Stat § 105-164.4B(a)(3), where the delivery address is unknown and the seller cannot ascertain an address of the purchaser. The seller should source the sale of such to the location from which the digital property or the computer software delivered electronically was first available for transmission by the seller.

<https://www.ncdor.gov/documents/important-notice-sourcing-digital-property-and-computer-software-delivered-electronically>



# North Carolina (SSUTA)

## C. Software as a Service (“SaaS”)

Generally, software as a service is a computer software distribution model that involves a service provider's use of computer hardware infrastructure and computer software to allow a consumer electronic access to the service provider's computer software. The computer software is not

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North Carolina Department of Revenue

SUTB 19

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downloaded to the consumer's computer, but is instead accessed electronically over a computer network, usually the Internet. North Carolina does not impose sales or use tax on charges for such services.

<https://files.nc.gov/ncdor/documents/files/SUTB-2019-FINAL-01272020.pdf>



# North Carolina (SSUTA)

## 23-1 DEFINITIONS

A. G.S. § 105-164.3 provides the following terms and definitions:

1. **“Audio work”** – A series of musical, spoken, or other sounds, including a ringtone. *(Examples include, but are not limited to: recorded songs, music, readings of books, or other written materials, speeches, and other sound recordings.)*
2. **“Audiovisual work”** – A series of related images and any sounds accompanying the images that impart an impression of motion when shown in succession. *(Examples include, but are not limited to: movies, motion pictures, and musical videos.)*
3. **“Digital code”** – A code that gives a purchaser of the code a right to receive an item by electronic delivery or electronic access. A digital code may be obtained by an electronic means. A digital code does not include a gift certificate or a gift card. *(Examples include, but are not limited to: song code, video code, or book code.)*
4. **“Electronic”** – Relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.
5. **“Information service”** – A service that generates, acquires, stores, processes, or retrieves data and information and delivers it electronically to or allows electronic access by a consumer whose primary purpose for using the service is to obtain the processed data or information.
6. **“Ringtone”** – A digitized sound file that is downloaded onto a device and that may be used to alert the user of the device with respect to a communication.

<https://files.nc.gov/ncdor/documents/files/SUTB-2019-FINAL-01272020.pdf>





# North Carolina (SSUTA)

## 23-2 IMPOSITION OF TAX

The general State, applicable local, and applicable transit rates of sales and use tax apply to the sales price of certain digital property sold at retail. The tax applies regardless of whether the purchaser of the property has the right to use it permanently or to use it without making continued payments.

An item listed below that is delivered or accessed electronically and that is not considered tangible personal property is certain digital property subject to sales and use tax:

1. An audio work.
2. An audiovisual work.
3. A book, a magazine, a newspaper, a newsletter, a report, or another publication.
4. A photograph or a greeting card.

Delivered or accessed electronically means delivered to, received by, or obtained by the purchaser by means other than tangible storage media. Delivered electronically is delivery by download, email, or other method; while accessed electronically is delivery by online access generally accompanied by a password or digital code.

<https://files.nc.gov/ncdor/documents/files/SUTB-2019-FINAL-01272020.pdf>



# North Carolina (SSUTA)

- [State Sales and Use Tax Statistics](#)
- **Sales revenue (in billion):** **\$8.9**
- **Population (in million):** **10.383**
- **Per capita sales tax:** **857**
- Raleigh
- Republican
- Esse quam videri (To be, rather than to seem)



# North Dakota (SSUTA)

- Similar to Nevada, North Dakota taxes prewritten software that is electronically transferred to via load and leave, but not specified digital products that are specifically exempt.
- ND ST 57-39.2-02.1 - Sale, lease, or rental of a computer and prewritten computer software, including prewritten computer software delivered electronically or by load and leave.
- SaaS is non-taxable in North Dakota. See <https://law.justia.com/codes/north-dakota/2013/title-57/chapter-57-39.2>

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
ND	Exempt.	Taxable.	Taxable.	No guidance.	Exempt.	Taxable.





- B. Tax applies to canned programs whether title to the storage media on which the program is recorded, coded or punched passes to the customer or the program is recorded, coded or punched on storage media furnished by the customer. The temporary transfer of possession of a program, for a consideration, for the purpose of direct use or to be recorded or punched by the customer or by the lessor on the customer's premises, is a sale or lease of tangible personal property and is taxable.
- C. Tax applies to the entire amount charged to the customer for a canned program. Where the consideration consists of license fees, royalty fees or program design fees, all fees present or future, whether for a period of minimum use or for extended periods, are included in the purchase price subject to tax.
- D. The sale of a canned program is a taxable transaction, even when the program is transferred by remote telecommunications from the seller's place of business, to or through the purchaser's computer. A canned program may be delivered to a customer electronically or by load and leave, and is considered to be a taxable transaction.



# North Dakota (SSUTA)

## ELECTRONICALLY DELIVERED SOFTWARE AND PRODUCTS

*T*he sale, license, or lease of canned (prewritten) computer software is specifically subject to sales tax. Canned software that is delivered to a customer in North Dakota electronically or via CD-ROM, diskette, or on other media is taxable (*Reference N.D. Admin. Code 81-04.1-03-11*).

When delivered electronically, sales of the pictures, music, videos, subscription to information or research products, or other electronic products are not taxable. ☒

<https://www.nd.gov/tax/data/upfiles/media/newsltr-jun011.pdf?20200214172112>



# North Dakota (SSUTA)

- [Comprehensive Annual Financial Report](#)
- **Sales revenue (in billion):**                      **\$1.326**
- **Population (in million):**                      **0.760077**
- **Per capita sales tax:**                      **1745**
- Bismarck
- Republican
- Liberty and union, now and forever, one and inseparable



# Oklahoma

- Oklahoma provides guidance through various private letter rulings. Oklahoma is very limited in taxing digital goods - only prewritten software that is delivered via load and leave or tangible medium is taxable.

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
OK	Exempt.	Exempt.	Taxable.	Not taxable. SaaS is not among the services subject to tax, which explicitly exempts e-sales of prewritten software.	Exempt.	Not taxable. Cable tv fees are excluded from taxable telecommunications services.



## OKLAHOMA TAX COMMISSION

TAX POLICY AND RESEARCH DIVISION  
TONY MASTIN, DIRECTOR

PHONE (405) 521-3133  
FACSIMILE (405) 522-0063

October 3, 2005

1. “If the prewritten software is tax exempt, then is the software maintenance contract on the prewritten software tax exempt?”

Response: Sales of prewritten software delivered electronically are exempt from Oklahoma sales tax. If the software maintenance contract does not provide for updates that are delivered via the delivery of tangible media, but instead only provides updates that are delivered electronically, the software maintenance contract is not subject to sales tax.

2. “What about software manuals?
  1. If they are provided in an electronic form along with the software (also in electronic form), is it taxable?

Response: If software manuals are only delivered electronically, then the charge for the manual is exempt from sales tax. If the software manuals are delivered via the transfer of tangible media, the charges for the manual are subject to sale tax.



# Oklahoma

- [Annual Report](#)
- **Sales revenue (in billion):** **\$3.071**
- **Population (in million):** **3.943**
- **Per capita sales tax:** **779**
- Oklahoma City
- Republican
- Labor omnia vincit (Labor conquers all things)



# Ohio (SSUTA)

- Ohio taxes most of digital goods, including software and "specified digital products" and even information services like access to data and databases.
  - The only non-taxable items are custom software and related update/upgrade contracts (mandatory and options) and those audio/audio-visual products that are not sold to the end users.
- While SaaS is not expressly addressed, it is likely taxed because Ohio also taxes data-processing services.
- With respect to digital products, which are electronically transferred, they are taxable when provided for use. Ohio went as far as to state on its website examples of taxpayer names who must pay tax, "32. *What is taxed under R.C. 5739.01(B)(12), "specified digital products"? - Examples are Netflix, HULU, I-Tunes, e-books for Kindle and other electronic readers.*" Ohio is rather similar in that it separately identifies TPP and prewritten software; specified digital products; and automatic data processing (ADP).

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
OH	Exempt, with some exemptions.	Taxable, unless it is customer software that is taxable as computer service	Taxable.	There is no guidance issued on SaaS. Ohio taxes the provision of e-information services (incl. internet access) for consideration for use in business by a customer.	Taxable. Digital products delivered electronically are taxable in Ohio. All digital music is taxable until 9/30/17.	Taxable – satellite broadcasting but not cable

- [\*CompuServe, Inc. v. Lindley\*](#), 41 Ohio App. 3d 260 (1987)(taxpayer wins; software is intangible if it an application software.)



# Ohio (SSUTA)

**On sales of software as a service (SaaS), isn't the tax rate determined based on where the user is located who benefits from the software?**

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Yes, where the benefit of the service is received. If the consumer of SaaS is located in Ohio the benefit is received in Ohio and it is taxable if used in business.

**1070. What is taxed under R.C. 5739.01(B)(12), "specified digital products" ?**

Items, including but not limited to, audiovisual products (such as movies), audio products (such as songs), and books delivered electronically. Tax applies to both temporary and permanent transfer (i.e., need not purchase the product for ownership). Examples are Netflix, HULU, I-Tunes, e-books for Kindle and other electronic readers.

<https://www.tax.ohio.gov/Researcher/VTa/OVTATopics/December2014/tabid/10720/Default.aspx?QuestionID=3326&AFMID=23354>





# Ohio (SSUTA)

## 1. What is taxed under R.C. 5739.01(B)(12), "specified digital products" ?

Items, including but not limited to, audiovisual products (such as movies), audio products (such as songs), and books delivered electronically. Tax applies to both temporary and permanent transfer (i.e., need not purchase the product for ownership). Examples are Netflix, HULU, I-Tunes, e-books for Kindle and other electronic readers.



## 2. When did digital products become taxable?

January 1, 2014. Making specified digital products taxable levels the playing field with physical goods that are currently taxed (printed books, CDs and DVDs, whether rented or owned).



## 3. Are electronically delivered photos, magazines and newspapers taxed as specified digital products?

These are not included in the definition of "digital products" and are not taxable.



## 4. Are specified digital products delivered via cable television systems taxed as specified digital products?

These will not be subject to sales tax.



## 5. Are specified digital products delivered thorough a "satellite broadcasting service" subject to tax?

Yes, even if separately stated on the bill such charges are taxable.



## 6. Is prewritten computer software taxable as specified digital products?

Yes, prewritten computer software is taxable, whether purchased in CD form or received electronically via download or otherwise.

<https://www.tax.ohio.gov/faq/tabid/6315/QuestionID/2828/AFMID/11354/Default.aspx>



# Ohio (SSUTA)

- [Annual Report](#)
- Sales revenue (in billion): \$10.3
- Population (in million): 11.689
- Per capita sales tax: 881
- Columbus
- D/R
- With God, all things are possible.



# Pennsylvania

- Digital products include canned software and video, etc. and these products are all taxable whether accessed or streamed.
- Separately, the state also taxes video programming etc. This approach eliminates a lot of possibly unnecessary guidance or distinctions.
- To achieve a broad coverage, Pennsylvania defined TPP to include not only corporeal personal property but items that are digital including their maintenance and updates "whether electronically or digitally delivered, streamed or accessed and whether purchased singly, by subscription or in any other manner" as taxable. However, in Pennsylvania, public television is not taxable.

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
PA	Exempt.	Taxable.	Taxable.	Taxable. "Cloud computing" is subject to tax when user is in PA.	Taxable.	Taxable.

- [Level 3 Communications v. Penn., 125 A.3d 832 \(Pa. 2015\)](#) -- PA, 2015 (taxpayer wins; tangible personal property includes telecommunications but not enhanced telecommunications including internet access); [Dechert LLP v. Commonwealth of Penn., 922 A.2d 87 \(Pa. 2007\)](#) - PA, 2008 (tax authority wins, rejecting an argument that license to use canned software intangible); [Graham Packaging Co. v. Penn., 882 A.2d 1076 \(Pa. 2005\)](#) - PA, 2005 (tax authority wins, software renewals are taxable, taxpayer received "physically arranged matter that animated computers" – reliance on LA case in *South Central Bell*)



# Pennsylvania

§ 7201. Definitions, PA ST 72 P.S. § 7201 --(m) “Tangible personal property.” -- (1) Corporeal personal property including, but not limited to, goods, wares, merchandise . . .

(2) The term shall include the following, *whether electronically or digitally delivered, streamed or accessed and whether purchased singly, by subscription or in any other manner, including maintenance and updates:*

- (i) video;
- (ii) photographs;
- (iii) books;
- (iv) any other otherwise taxable printed matter;
- (v) applications, commonly known as apps;
- (vi) games;
- (vii) music;
- (viii) any other audio, including satellite radio service;
- (ix) canned software, notwithstanding the function performed, including support, except separately invoiced help desk or call center support; or
- (x) *any other otherwise taxable tangible personal property electronically or digitally delivered, streamed or accessed.*



# Pennsylvania



## Tax on Digital Products

### WHAT'S NEW

Act 84 of 2016, specifically applies the commonwealth's 6 percent sales and use tax to the purchase of digital products delivered to a customer electronically, digitally or by streaming.

### WHAT ARE DIGITAL PRODUCTS?

Digital products include any product transferred electronically to a customer by download, streaming, or through other electronic means.

Common examples of digital products include video, music, books, apps, games, and canned software.

"Transferred electronically" means the product is accessed or obtained in a way other than a USB drive, DVD disk or other physical storage.

- **Apps and games** that are downloaded, add-ons to an app or game, and subscriptions to online games.
- **Photographs**
- **e-greeting cards**

### WHAT IS THE AMOUNT OF TAX DUE?

The sales and use tax is 6 percent of the purchase price. If a ringtone is \$1, the tax is \$.06.

### HOW DO I PAY THE TAX?

Businesses with operations in Pennsylvania are responsible for collecting the tax and remitting it to the department.

### WHAT IF THE BUSINESS DOESN'T COLLECT THE TAX?

The customer should report the purchase on

[https://www.revenue.pa.gov/GeneralTaxInformation/Tax%20Types%20and%20Information/SUT/Documents/digital\\_products\\_tax\\_qa.pdf](https://www.revenue.pa.gov/GeneralTaxInformation/Tax%20Types%20and%20Information/SUT/Documents/digital_products_tax_qa.pdf)



# Pennsylvania

## WHEN IS A TRANSFER OF DIGITAL MEDIA TAXABLE?

The sales and use tax applies to any transfer of a digital product where the purchaser pays a consideration, unless that transfer is otherwise exempt.

Common purchases of digital products that are taxable include, but are not limited to:

- **E-books** or a subscription to download e-books.
- **Digital video** that is downloaded or streamed or a subscription to a streaming service, such as Netflix or Hulu.
- **Digital audio** that is downloaded or streamed including songs, ringtones, and audio books from iTunes, Google Play and other services, as well as subscriptions to satellite radio and other streaming services.

- **Apps and games** that are downloaded, add-ons to an app or game, and subscriptions to online games.
- **Photographs**
- **e-greeting cards**

## WHAT IS THE AMOUNT OF TAX DUE?

The sales and use tax is 6 percent of the purchase price. If a ringtone is \$1, the tax is \$.06.

## HOW DO I PAY THE TAX?

Businesses with operations in Pennsylvania are responsible for collecting the tax and remitting it to the department.

## WHAT IF THE BUSINESS DOESN'T COLLECT THE TAX?

The customer should report the purchase on their Pennsylvania personal income tax return the following year.

[https://www.revenue.pa.gov/GeneralTaxInformation/Tax%20Types%20and%20Information/SUT/Documents/digital\\_products\\_tax\\_qa.pdf](https://www.revenue.pa.gov/GeneralTaxInformation/Tax%20Types%20and%20Information/SUT/Documents/digital_products_tax_qa.pdf)



# Pennsylvania

## Common purchases of digital products that are taxable include, but are not limited to:

- **e-books** from Amazon Kindle, Barnes & Noble's Nook Press and other retailers or a subscription to download e-books, such as Scribd.
- **Digital video** that is downloaded or streamed or a subscription to a streaming service, such as Netflix or Hulu.
- **Digital audio** that is downloaded or streamed including songs, ringtones, and audio books from iTunes, Google Play and other services, as well as subscriptions to satellite radio and other streaming services.
- **Apps and games** that are downloaded, add-ons to an app or game, and subscriptions to online games.
- **Photographs**
- **e-greeting cards**

<https://www.revenue.pa.gov/GeneralTaxInformation/Tax%20Types%20and%20Information/SUT/Pages/Digital-Products.aspx>





# Pennsylvania

- Collections
- Sales revenue (in billion): \$11.1
- Population (in million): 12.807
- Per capita sales tax: 867
- Harrisburg
- D/R
- Virtue, liberty, and independence





# Rhode Island (SSUTA)

- On 10/1/2018, Rhode Island announced that the sale, storage, use, or other consumption of vendor-hosted prewritten computer software, sometimes referred to as “software as a service”, or SaaS, will be subject to Rhode Island’s 7 percent sales and use tax.
  - In Rhode Island, SaaS is expressly taxable.
- Similarly to Kentucky, Ohio, Rhode Island taxes most digital products (canned software and specified digital goods for end user) that are transferred electronically, that is obtained by the purchaser by means other than tangible property. No mention of "access" or "stream" in the law.
- One interesting aspect about Rhode Island’s framework is that it has a law that presumes that TPP, prewritten software and digital products are taxable unless proven otherwise to the satisfaction of the tax administrator.

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
RI	Exempt.	Taxable.	Taxable.	Eff. 10/1/18, taxable.	Eff. 10/1/19, taxable.	Taxable.



# Rhode Island (SSUTA)



## Rhode Island Department of Revenue Division of Taxation

ADV 2018-38  
SALES TAX AND USE TAX

ADVISORY FOR TAX PROFESSIONALS  
SEPTEMBER 4, 2018  
(REV. SEPTEMBER 13, 2018)

### **Tax change takes effect on Monday, October 1**

*Sales/use tax to apply to vendor-hosted prewritten computer software ("software as a service")*

PROVIDENCE, R.I. – The Rhode Island Division of Taxation reminds tax professionals, tax software providers, businesses, and others about a tax change that will take effect on Monday, October 1, 2018.

On and after that date, the sale, storage, use, or other consumption of vendor-hosted prewritten computer software, sometimes referred to as "software as a service", or SaaS, will be subject to Rhode Island's 7 percent sales and use tax.<sup>1</sup>

"If you access or use software available via the Internet, whether you download it or not, it will be taxable" starting October 1, 2018, said Assistant Tax Administrator Michael F. Canole, CPA.

"Under the new law, the tax will apply regardless of whether the access to, or use of, the software is permanent or temporary, and regardless of whether any downloading occurs," he said.

#### WHAT'S NEW

- Rhode Island's sales and use tax will be extended to include software as a service.
- The new law applies to transactions on and after October 1, 2018.
- The new law applies to software for accounting, invoicing, human resources, payroll, sales tracking, and a number of other functions.
- If the vendor does not collect the tax,

[http://www.tax.ri.gov/Advisory/ADV\\_2018\\_38.pdf](http://www.tax.ri.gov/Advisory/ADV_2018_38.pdf)



# Rhode Island (SSUTA)

§ 44-18-16. Tangible property defined, RI ST § 44-18-16 -“Tangible personal property” means personal property which may be seen, weighed, measured, felt, or touched, or which is in any other manner perceptible to the senses. “Tangible personal property” includes electricity, water, gas, steam, and prewritten computer software. \*\*\*§ 44-18-7.1. Additional definitions,

## RI ST § 44-18-7.1(x) Specified Digital Products

(i) “Specified digital products” means **electronically transferred**:

(A) “Digital Audio-Visual Works” which means a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any;

(B) “Digital Audio Works” which means works that result from the fixation of a series of musical, spoken, or other sounds, including ringtones, and/or;

(C) “Digital Books” which means works that are generally recognized in the ordinary and usual sense as “books”.

(ii) For purposes of the definition of “digital audio works”, “ringtones” means digitized sound files that are downloaded onto a device and that may be used to alert the customer with respect to a communication.

(iii) For purposes of the definitions of “specified digital products”, **“transferred electronically” means obtained by the purchaser by means other than tangible storage media.**



# Rhode Island (SSUTA)

- [Revenue Report](#)
- **Sales revenue (in billion):** \$1
- **Population (in million):** 1.057
- **Per capita sales tax:** 946
- Providence
- Democratic
- Hope



# South Carolina

- South Carolina is unique in how it stretches the definition of tangible personal property (TPP) to include services such as communications, but at the same time to exclude transmission of computer database information.
- The guidance is not very clear and is generally based on private letter rulings.
  - There are authorities suggesting that SaaS is software sold via Application Service Provider (ASP) and taxable.
  - Software delivered via an Application Service Provider, whereby the seller maintains the software on a website and the purchaser pays to access the software on that website, is subject to the sales and use tax.

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
SC	Taxable.	Taxable.	Taxable.	Taxable. Charges by an Application Service Provider (ASP) that allows a customer to access the ASP website and use the software on that website are taxable as communications services. Other software sold and delivered by e-means is not taxable.	Taxable.	Taxable. Taxable communications services.

- [\*Citizens and Southern Sys. V. South Carolina Tax Comm'n\*](#), 280 S.C. 138 (S.C. 1984) (tax authority wins; the form of transmitting software matters, software was tangible)



# South Carolina

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State of South Carolina  
**Department of Revenue**  
301 Gervais Street, P. O. Box 125, Columbia, South Carolina 29214  
Website Address: <http://www.sctax.org>

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## SC REVENUE RULING #03-5

**SUBJECT:** Software  
(Sales & Use Tax)

**EFFECTIVE DATE:** Applies to all periods open under the statute.

**SUPERSEDES:** All previous advisory opinions and any oral directives in conflict herewith.

**REFERENCES:** Chapter 36 of Title 12 (2000 and Supp. 2001)

**AUTHORITY:** S. C. Code Ann. Section 12-4-320 (2000)  
S. C. Code Ann. Section 1-23-10(4) (Supp. 2001)  
SC Revenue Procedure #03-1



# South Carolina

## **Software Delivered by Electronic Means from a Remote Location**

7. Is “canned” software sold and delivered by electronic means via a modem and telephone line from a remote location subject to the sales and use tax?

Software sold and delivered by electronic means via a modem and telephone from a remote location is not subject to the sales and use tax, provided no part of the software, including back-up diskettes and tapes, is delivered by tangible means.

9. If software is sold and delivered to the customer by electronic means via a modem and telephone line from a remote location, and no part of the software, including back-up diskettes and tapes, is delivered in a tangible form, is the transaction subject to the sales and use tax if written documentation or publications are provided in tangible form?

No.

10. If software is sold and delivered to the customer by electronic means via a modem and telephone line from a remote location, and no part of the software, including back-up diskettes and tapes, is delivered in a tangible form in the initial transfer, is the transaction subject to the sales and use tax if under the contract the seller is obligated to restore the customer’s “crashed” computer with replacement software (the same software originally delivered by electronic means), and the contract does not specify whether the restoration will be performed by electronic or tangible means?

No.

<https://dor.sc.gov/resources-site/lawandpolicy/Advisory%20Opinions/RR03-5.pdf>





## **Software Provided through an Application Service Provider**

15. Is a charge by Application Service Provider (ASP) that allows a customer to access the ASP website and use the software on that website subject to the sales and use tax?

Yes. Charges by an Application Service Provider are similar to charges by database access services and are therefore subject to the sales and use tax under the provisions of Code Sections 12-36-910(B)(3) and 12-36-1310(B)(3).





# South Carolina

- SC ST § 12-36-60 - “Tangible personal property” means personal property which may be seen, weighed, measured, felt, touched, or which is in any other manner perceptible to the senses.
- It also includes services and intangibles [unique approach], including communications, laundry and related services, furnishing of accommodations and sales of electricity, the sale or use of which is subject to tax under this chapter and does not include stocks, notes, bonds, mortgages, or other evidences of debt.
- Tangible personal property does not include the transmission of computer database information by a cooperative service when the database information has been assembled by and for the exclusive use of the members of the cooperative service.



# South Carolina

- [Annual Report](#)
- **Sales revenue (in billion):** **\$3**
- **Population (in million):** **5.084**
- **Per capita sales tax:** **590**
- Columbia
- Republican
- Dum spiro spero Animis opibusque parati (While I breathe, I hope Ready in soul and resource)



# South Dakota (SSUTA)

- Early on, back in 2011, using a Fact Sheet format, South Dakota announced its position that it would not treat digital goods differently, pointing out that the method of delivery should not matter.
- Web hosting services are subject to state sales tax, plus applicable municipal sales tax based on the customer's location. Not entirely clear if South Dakota would tax software as a service. South Dakota taxes prewritten software only as included in the definition.
- South Dakota does not appear to tax those purchases of software or e-products that merely require access and that are not actually electronically obtained. Even in its 2011 Fact Sheet, South Dakota provides examples of “downloaded” movie.
- Unlike Massachusetts that exempts cable television but not broadcasting, South Dakota imposes tax on cable television but not broadcasting.

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
SD	Taxable.	Taxable.	Taxable.	Taxable. While no mention is made of cloud computing, fees for access to software, databases or networks are taxable.	Taxable. Software and other digitized products downloaded from or transmitted via the Internet are taxable if the products are taxed when sold in tangible form.	Taxable.



# South Dakota (SSUTA)

**South Dakota  
Department of Revenue  
445 East Capitol Avenue  
Pierre, South Dakota 57501 - 3185**

## Products Transferred Electronically

March 2011

This Tax Facts Sheet is to explain how sales and use tax applies to products transferred electronically. If your specific question is not answered in this Tax Fact Sheet, please call our toll-free helpline at 1-800-TAX-9188 weekdays from 8-5 CT.

**Information found in this document rescinds and replaces all previous written information on this subject. All readers and users of this publication are responsible for keeping informed about changes in tax laws and regulations by reading the Department of Revenue newsletters, press releases, Tax Facts, and other documents published by the department.**

In South Dakota the receipts from the sale of tangible personal property have been subject to sales tax since 1935. Since that time methods of delivering products has expanded to include transferring products electronically. Products transferred electronically are taxed as a sale of tangible personal property. However some states

### Digital Codes

The sale of a digital code that may be utilized to obtain a product transferred electronically is subject to the same tax as the product the digital code is for. A digital code is a code that permits a purchaser to obtain at a later date a product transferred electronically. Digital codes are taxed at the time the code is purchased. Example: A gift card is purchased that allows access to downloadable music. The card owner enters a code that allows a set number of songs to be downloaded. The sale of music is subject to sales tax, therefore the code to obtain the music is also subject to sales tax. Unless there is an additional fee when the music is downloaded, no additional tax applies when the card owner receives his or her music.

### Where Tax Applies

The sale of tangible personal property, products transferred elec

<https://dor.sd.gov/media/argitevb/products-transferred.pdf>



# South Dakota (SSUTA)

## Products Transferred Electronically

A product transferred electronically is any product obtained by the purchaser by means other than tangible storage media such as a cd, dvd, disk or tape. A product transferred electronically does not include any intangible such as a patent, stock, bond, goodwill, trademark, franchise, or copyright.

## Temporary or Permanent Use

Sales tax applies to products transferred electronically when the purchaser has temporary use of the product and when the purchaser has permanent use of the product. Example: Access to a downloaded movie for three days is a temporary use of a product and is subject to sales tax. Purchasing a movie that is downloaded to a computer for permanent use is also subject to sales tax.

4. If items are delivered, but no delivery address or customer address is on file, then sales tax applies based on the address from which:

- a. Tangible personal property was shipped;
- b. The product transferred electronically was first available for transmission by the seller; or
- c. The service was provided.

Use tax is applied to tangible personal property, products transferred electronically and services where the products are used, stored, or consumed.

Examples of products transferred electronically – this is not an all inclusive list: Music, Books, Videos, Movies, Newspapers, Custom computer **software**, Photos, clip art etc.



## South Dakota (SSUTA)

- SD ST § 10-45-2.4 --

The tax is imposed if: (1) The sale is to an end user; (2) The sale is to a person who is not an end user, unless otherwise exempted by this chapter;

(3) The seller grants the right of permanent or less than permanent use of the products transferred electronically; or (4) The sale is conditioned or not conditioned upon continued payment.

For the purposes of this section, the term, end user, does not include any person who received by contract any product transferred electronically for further commercial broadcast, rebroadcast, transmission, retransmission, licensing, relicensing, distribution, redistribution, or exhibition of the product, in whole or in part, to another person.

For the purposes of this section, the term, permanent use, means perpetual or for an indefinite or unspecified length of time. The sale of a digital code that may be utilized to obtain a product transferred electronically shall be taxed in the same manner as the product transferred electronically. A digital code is a code that permits a purchaser to obtain at a later date a product transferred electronically.



# South Dakota (SSUTA)

- [Annual Report](#)
- Sales revenue (in billion): \$1.49
- Population (in million): 0.882235
- Per capita sales tax: 1689
- Pierre
- Republican
- [Under God the people rule](#)





# Tennessee (SSUTA)

- Tennessee taxes computer software (all types) and digital products, including access to television/satellite service, except data processing, which is excluded.
  - Tennessee specifically states that TPP does not include signals broadcast over airwaves.
- The taxable use of computer software in Tennessee includes the access and use of software that remains in possession of the seller and is remotely accessed by a customer for use in this state. This provision ensures that software remains subject to sales and use tax regardless of a customer's method of use.

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
TN	Taxable. An exception applies to a person's development of software for his or her own use.	Taxable.	Taxable.	Taxable.	Taxable.	Taxable. Cable/satellite are taxable if the charge is greater than \$15.

[Lockheed Martin Energy Systems, Inc. v. Johnson](#), 78 S.W. 3d 918 (Tenn. App. 2002)(taxpayer wins; a party fabricating software for its use, even if the title is transferred to the government, is not subject to tax);

Creasy Systems Consultants v. Olsen, 716 S.W. 2d 35 (Tenn. 1986) (fabrication or modification of clients' computer software was sale subject to tax)

[Commerce Union Bank v. Tidwell](#), 538 S.W.2d 405 (Tenn. 1976)(taxpayer wins, software – intangible knowledge, superseded by statute as stated in Lockheed Martin Energy Sys. v. Johnson, Tenn. Ct. App. (Jan. 31, 2002))





# Tennessee (SSUTA)

## Computer Software

Computer software is defined in sales tax law to mean a set of coded instructions designed to cause a computer or automatic data processing equipment to perform a task. Tennessee imposes state and local sales and use tax on the retail sale, lease, licensing, or use of computer software in this state.

## Customized and Prewritten Computer Software

Computer software developed by the author to the specifications of a specific purchaser is considered to be customized computer software.

## Specified Digital Products

Specified digital products are products that are electronically transferred to the purchaser or accessed electronically by the purchaser. Products that are defined as specified digital products include the following products:

### Digital Audio-Visual Works

A series of related images which, when shown in succession, impart an impression of motion, together with any accompanying sounds, that are transferred electronically. Examples include motion pictures, musical videos, entertainment and news programs, and live events.

Not included are video greeting cards sent by electronic mail, video or electronic games, and individual digital photographs

<https://www.tn.gov/content/dam/tn/revenue/documents/taxguides/salesanduse.pdf>



# Tennessee (SSUTA)

- TN ST § 67-6-102(89)(A) --“Tangible personal property” means personal property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses. “Tangible personal property” includes electricity, water, gas, steam, and prewritten computer software;
- (B) “Tangible personal property” does not include signals broadcast over the airwaves;
- . . .
- 67-6-102. Definitions, TN ST § 67-6-102(86) - “Specified digital products” means electronically transferred digital audio-visual works, digital audio works and digital books. For purposes of this subdivision (86), “electronically transferred” means obtained by the purchaser by means other than tangible storage media.



# Tennessee (SSUTA)

- **“Tangible personal property” includes prewritten software only. § 67-6-102(89)(A), but per § 67-6-231 (a) ("The retail sale, lease, licensing or use of computer software in this state, including prewritten and custom computer software, shall be subject to the tax levied by this chapter...")**
- **A website is considered software.**

<https://www.tn.gov/content/dam/tn/revenue/documents/taxguides/salesanduse.pdf>



# Tennessee (SSUTA)

## Websites and Computer Software

Additionally, a web site is considered computer software, so the sale of web site development and design is taxable under state law. If a web site is created in Tennessee for hosting outside of Tennessee, the sale is in interstate commerce and not subject to sales tax.

However, if a web site is hosted in Tennessee, the sale of the computer software that is the web site is subject to sales tax. A dealer is liable for sales or use tax on any type of tangible personal property or computer software used in the conduct of business. Therefore, if a Tennessee seller creates a web site for an out-of-state customer and hosts the web site in Tennessee, the out-of-state customer is liable for tax if title to the computer software transfers to the out-of-state customer. Generally, a charge for

## Remotely Accessed Computer Software [Tenn. Code Ann. § 67-6-231]

The taxable use of computer software in Tennessee includes the access and use of software that remains in possession of the seller and is remotely accessed by a customer for use in this state. This provision ensures that software remains subject to sales and use tax regardless of a customer's method of use.

<https://www.tn.gov/content/dam/tn/revenue/documents/taxguides/salesanduse.pdf>



# Tennessee (SSUTA)

- [Annual Report](#)
- **Sales revenue (in billion):** **\$8.9**
- **Population (in million):** **6.77**
- **Per capita sales tax:** **1315**
- Nashville
- Republican
- Agriculture and Commerce



# Texas

The e- form as opposed to its physical media does not alter the tax status. Along with 10 other states (AL, CT, DC, HA, IA, MS, NE, SC, TE, WV), TX does not distinguish between canned or prewritten/customized software--all taxable. TX taxes information services and data processing. Tex. Tax Code Ann. § 151.0101(a)(10), (12).

TX addresses taxability of SaaS under data processing services, which include data storage and manipulation as well as cable television services (any video streaming) as taxable items that are defined very broadly to accommodate to any changes in technology.

TX taxes the digital distribution of video programming to purchasers by any means now in existence or that may be developed; a spectrum of data-transmission services - satellite, antenna: direct broadcast satellite service (DBS); subscription television service (STV); satellite master antenna television service (SMATV); master antenna television service (MATV); etc.

[First Nat'l Bank of Fort Worth v. Bullock](#), 584 S.W.2d 548 (App. Tex. 1979) (taxpayer wins, based on the “essence of transaction,” software was deemed intangible)

[Verizon North Inc. v. Combs](#), 308 S.W. 3d 1 (Tex. App. 2009) (tax authority wins; some configuration or customization for a purchaser specific intended use does not change that the program was sold as “complete”)

[Verizon Business Network Serv. v. Combs](#), 2013 WL 1343530 (Tex. App. 2013) (tax authority wins; taxpayer could not treat feature enhancements as improvements or maintenance when the invoice was for a lump sum feature enhancements that altered the software and when there was only one shipping address to Texas)

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
TX	Taxable.	Taxable if the download is to a location in Texas.	Taxable.	Taxable.	Taxable.	Taxable.



# Texas

## DATA PROCESSING SERVICES ARE TAXABLE

Data processing is a service performed with a computer using the customer's data. Entering, storing, manipulating, or retrieving a customer's data is taxable. But merely using the computer as a tool to help perform a professional service is not taxable.

### Taxable Services

We've prepared a partial list of taxable data processing services. This will give you an idea of the type of service that is taxable when performed using a computer. If you provide a different service for a client, and are not sure if it's taxable, give us a call at the toll-free number listed on this bulletin.

Examples of taxable services are:

- Accounts payable
- Accounts receivable billing
- Check preparation
- Computer-aided drafting, when the client provides specifications
- Data conversion services
- Editing client's data
- Entering client's data
- Totalisator services
- Internet services: creating web (home) page and providing server space
- Formatting client's data
- Data storage

<https://comptroller.texas.gov/taxes/publications/94-127.php>





# Texas

TX TAX § 151.0031 -- “Computer program” means a series of instructions that are coded for acceptance or use by a computer system and that are designed to permit the computer system to process data and provide results and information. The series of instructions may be contained in or on magnetic tapes, punched cards, printed instructions, or other tangible or electronic media.\*\*\*

“Cable television service” means the distribution of video programming with or without use of wires to subscribing or paying customers.

“Data processing service” includes word processing, data entry, data retrieval, data search, information compilation, payroll and business accounting data production, the performance of a totalisator service with the use of computational equipment required by Subtitle A-1, Title 13, Occupations Code (Texas Racing Act), and other computerized data and information storage or manipulation. § 151.0035.

TX TAX § 151.0035 -- “Data processing service” also includes the use of a computer or computer time for data processing whether the processing is performed by the provider of the computer or computer time or by the purchaser or other beneficiary of the service. “Data processing service” does not include the transcription of medical dictation by a medical transcriptionist. “Data storage,” as used in this section, does not include a classified advertisement, banner advertisement, vertical advertisement, or link when the item is displayed on an Internet website owned by another person.

TX TAX § 151.0038 - “Information service” means:

- (1) furnishing general or specialized news or other current information, including financial information, unless furnished to:
  - (A) a newspaper or to a radio or television station licensed by the Federal Communications Commission; or
  - (B) a member of a homeowners association of a residential subdivision or condominium development, and is furnished by the association or on behalf of the association; or
- (2) electronic data retrieval or research.



# Texas

- [Revenue By Source](#)
- **Sales revenue (in billion):** **\$31.9**
- **Population (in million):** **29.2**
- **Per capita sales tax:** **1092**
- Austin
- Republican
- Friendship



# Utah (SSUTA)

- TPP includes prewritten computer software (PCS). Utah does not use the terms specified digital products (SDP) or specified digital goods (SDG), but rather the term “product transferred electronically.”
- Software as a Service is taxable if “used” – importantly no transfer or control share is necessary. On its website, Utah explains how it taxes software as a service (SaaS) or remotely accessed software:
  - If remotely accessed software is used at more than one location and at the time of the transaction, the buyer provides the seller a reasonable and consistent method for allocating the transaction between those locations, the seller must source the transaction to those locations. However, for the product transferred electronically, Utah requires some transfer, i.e., the product must be downloaded. If the Subscribers were paying for access to streamed content, those transactions would not be subject to Utah sales and use taxes."
- There are pending proposals /drafts to make the definition even more clear to include streaming.

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
UT	Exempt. However, the transaction is taxable if sold to a person other than the person who made the application.	Taxable.	Taxable.	Taxable. License fees for remotely accessed prewritten software are taxable if the purchased software is used in the state.	Taxable.	Taxable. Amounts paid are not subject to local-option sales taxes.

- *South Central Utah Tele. Ass’n, Inc. v. Auditing Div. Utah*, 951 P.2d 218 (Utah 1997) (tax authority wins; the telephone company did not rent its equipment to subscribers who accessed the dial tone; the software did not become intangible once installed; and the software maintenance agreements did not require performance to be subject to tax as the warranty agreements)
- *Mark O. Haroldsen, Inc. v. State Tax Comm’n*, 805 P.2d 176 (Utah 1990)(tax authority wins, the mailing lists provided on magnetic tapes were tangible; the “alternative means” test or “the essence of transaction” test did not make the transaction nontaxable)



# Utah (SSUTA)

# Utah!

 [tax.utah.gov](http://tax.utah.gov)

**Publication 64**

Revised 5/12

This publication provides general guidance only. It does not contain all sales or use tax laws or rules.

## **Sales Tax Information for Computer Service Providers**

Utah State Tax Commission

210 North 1950 West  
Salt Lake City, Utah 84134  
801-297-2200  
1-800-662-4335  
[www.tax.utah.gov](http://www.tax.utah.gov)



*If you need an accommodation under the Americans with Disabilities Act, call 801-297-3811, or TDD 801-297-2020. Please allow three working days for a response.*

<https://tax.utah.gov/forms/pubs/pub-64.pdf>



# Utah (SSUTA)

## Introduction

This publication gives sales tax information for sales, installation, repair and support of software, computers and related equipment. It includes Utah law and Tax Commission rules, but is not all-inclusive. Future law or rule changes may change this publication.

Find general sales and use tax information in Publication 25.

## General Information

Sales tax is imposed on the sale, lease or rental of tangible personal property and certain services.

## Hardware

Computer hardware and parts are tangible personal property and subject to sales tax.

## Software

Software includes computer programs, applications, scripts and instruction sets.

### Prewritten Software

Prewritten software is created for general sales and not for the special needs of a single customer.

Prewritten software is tangible personal property.

Sales, rentals, leases and charges for using prewritten software in Utah are taxable regardless of delivery method (boxed, hosted, downloaded, etc.).

Charges to upgrade prewritten software are also taxable.

Charges to modify or adapt prewritten software for a customer are nontaxable if the charges are reasonable and separately stated on the invoice. However, if the charges to modify or adapt prewritten software include charges for the prewritten part of the software, those charges for the prewritten part of the software are taxable.

→ **NOTE:** Simply adding a client name or account number is not a modification or adaptation of prewritten software. Charges for this type of service connected with a prewritten software sale are taxable.

## Custom Software

Custom software is written for the needs of a specific customer. Custom software is not tangible personal property.

Sales, rentals, leases and charges for using custom software are nontaxable. Charges to maintain, support or upgrade custom software are also nontaxable.

## Remotely Accessed Software

Remotely accessed software includes hosted software, application service provider (ASP) software, software-as-a-service (SAAS), and cloud computing applications.

License fees for remotely accessed prewritten software are taxable if the purchased software is used in Utah. If remotely accessed software is used at more than one location and at the time of the transaction, the buyer provides the seller a reasonable and consistent method for allocating the transaction between those locations, the seller must source the transaction to those locations. If the buyer does not provide the seller with a method of allocating a transaction that is used in multiple locations, the seller must source the transaction to the buyer's address.

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### Example 1

Seller, who has Utah nexus, offers remote access to prewritten software through servers located outside of Utah. Buyer, who has a single location in Utah, purchases this remote access. Seller will collect tax at the rate in Buyer's location.

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# Utah (SSUTA)

## Products Transferred Electronically

Audio, video and data that are not delivered on physical storage media (CD, DVD, diskette, tape, etc.).

Examples include:

- Music
- Reading material
- Ring tones
- Movies

<https://tax.utah.gov/forms/pubs/pub-25.pdf>



# The Utah State Legislature is considering taxing your Netflix

**Posted:** 4:42 PM, Nov 15, 2017 **Updated:** 6:12 PM, Nov 16, 2017

**By:** Ben Winslow

SALT LAKE CITY -- Faced with revenue losses and rapid advances in technology, the Utah State Legislature is looking at taxing streamed media.

In a presentation of a massive 234-page omnibus tax bill, lawmakers have proposed the concept of taxing streamed media. The issue, the legislature's interim Revenue & Taxation Committee was told, is that the laws have not been updated since the 1990s, when DVDs were the new thing.

"If it's downloadable media, it's taxed," John Valentine, the Utah State Tax Commission Chairman, told FOX 13 after the hearing. "If it's streamed media, it's tax exempt."

<https://fox13now.com/2017/11/15/the-utah-state-legislature-is-considering-taxing-your-netflix/>





# Utah (SSUTA)

- [Annual Report](#)
- **Sales revenue (in billion):** \$2.6
- **Population (in million):** 3.161
- **Per capita sales tax:** 823
- Salt Lake City
- Republican
- Industry



# Vermont (SSUTA)

- Vermont's statute is basic: software that is prewritten and obtained or downloaded only is taxable, so are specified digital products. Yet one twist is that Vermont separately taxes access to cable television or broadcasting. Hence, it surely appears that Vermont taxes streaming just like Iowa, Pennsylvania, Washington DC.
- [\*Chittenden v. King\*](#), 143 Vt. 271 (Vt. 1983) (tax authority wins, the computer software tape is tangible as it can be seen and is off the shelf)

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
VT	Exempt.	Taxable if prewritten.	Taxable.	Not taxable.	Taxable.	Not taxable (?)



# Vermont (SSUTA)

## Prewritten Software Accessed Remotely

### Current Law

For the purpose of Vermont Sales Tax, charges for remote access to prewritten software *accessed solely through an internet or cloud platform* are not taxable.

### Exemption to Sales Tax

Vermont generally imposes the Vermont Sales Tax on retail sales of tangible personal property. Tangible personal property is defined to include prewritten computer software in 32 V.S.A. § 9701(7). However, prewritten software accessed remotely and not installed on a computer does not fall within this definition.

### Taxable Digital Products

Prewritten software that is downloaded from the internet and installed on a computer, as well as software delivered by portable storage media, falls under the Section 9701(7) definition of taxable tangible personal property. Other specified digital products also remain taxable. Under 32 V.S.A. § 9771(8), Vermont specifically imposes the sales tax on digital audio-visual works, digital audio works, digital books, and ringtones that are transferred electronically. These digital products are defined in 32 V.S.A. § 9701(46).

### What is “Prewritten Software Accessed Solely Through an Internet or Cloud Platform”?

- It is not tangible personal property.
- It is not downloaded to the purchaser’s computer.
- It is accessed only on a remote internet or cloud platform.
- This product is sometimes referred to as “Software as a Service (SaaS)”

### What is “Tangible Personal Property”?

Tangible personal property means personal property which may be seen, weighed, measured, felt, touched, or in any other manner perceived by the senses. 32 V.S.A. § 9701(7)

<https://tax.vermont.gov/sites/tax/files/documents/Prewritten%20Software%20Accessed%20Remotely.pdf>



# Vermont (SSUTA)

## What is Taxable and Nontaxable?

Product	Taxable	Nontaxable
Custom software written exclusively for the customer's business		✓
Prewritten software on tangible storage media	✓	
Prewritten software downloaded from the internet	✓	
Prewritten software accessed remotely on the internet or SaaS		✓
Infrastructure as a Service (IaaS)		✓
Platform as a Service (PaaS)		✓
Development and technical support services		✓
Digital photographs		✓
Digital audio-visual works	✓	
Digital audio works	✓	
Digital books	✓	
Ringtones	✓	

<https://tax.vermont.gov/sites/tax/files/documents/Prewritten%20Software%20Accessed%20Remotely.pdf>



# Vermont (SSUTA)

- [Comprehensive Annual Financial Report](#)
- **Sales revenue (in billion):**                      **\$0.397**
- **Population (in million):**                      **0.626299**
- **Per capita sales tax:**                      **634**
- Montpelier
- Democratic
- Freedom and Unity



# Virginia

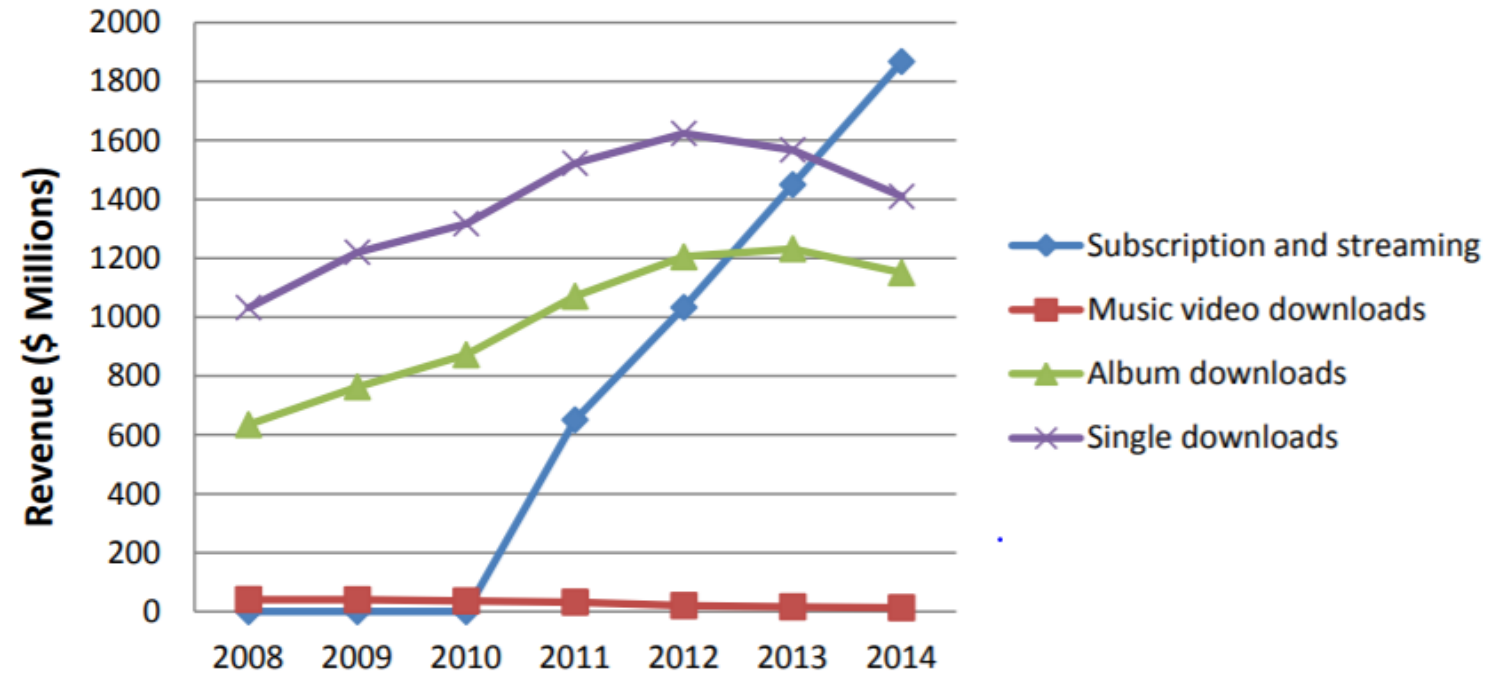
- Virginia taxes tangible prewritten computer software and communications services.
  - The definition of tangible personal property does not refer to software. VA ST § 58.1-3500.
  - Virginia's communications sales and use tax applies to more than 10 services, including cable television service, landline and wireless telephone services, and satellite television and radio services.
- "Under Virginia law, prewritten computer software delivered in tangible form is subject to sales and use tax. Custom software and software delivered electronically are not taxable.
- SaaS is non-taxable in Virginia. Ruling 12-191.

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
VA	Exempt.	Exempt.	Taxable.	Not taxable.	Exempt.	Taxable. The communications service tax applies.



## Report of the 2015 Communications Sales and Use Tax Study

Digital music revenue in the U.S. from 2008  
to 2014, by type



<https://www.tax.virginia.gov/sites/default/files/inline-files/2015-communications-sales-and-use-tax-study.pdf>





## Exemptions

The advisory panel reviewed the current exemptions from the CSUT, specifically the exemption for streaming audio and video and the exemption for prepaid calling services.

The Department currently allows an exemption for audio and video streaming services based on the statutory exemption provided under *Va. Code* § 58.1-648, for “digital products delivered electronically.” If the exemption for digital products delivered electronically was clarified so as to not cover audio and video streaming services, such services would be subject to taxation. The current exemption for streaming audio and

Department of Taxation

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December 11, 2015

video services places similar services provided by cable television providers at a competitive disadvantage.



## Rulings of the Tax Commissioner

Document Number:	12-191
Tax Type:	Retail Sales and Use Tax
Description:	Web-Based Portal; Text Messaging; Billing Services
Topic:	ExemptionsInternet SalesRecords/Returns/Payment:
Date Issued:	11-29-2012

### Web-Based Portal

November 29, 2012

The Taxpayer states that it plans to provide access to a web-based portal via the Internet. Based on Taxpayer statements, no tangible personal property will be provided with the access services. Therefore, in accordance with the foregoing statute, the monthly subscription fee for access to the web-based portal is not subject to the tax. As the subscription fee is exempt, the location of the Taxpayer's computer server, the reseller, the pharmacies or its patients does not affect the taxability of these fees in Virginia.

<https://www.tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/12-191>



# Virginia

- [Annual Report](#)
- **Sales revenue (in billion):** **\$3.458**
- **Population (in million):** **8.517**
- **Per capita sales tax:** **406**
- Richmond
- Democratic
- Sic semper tyrannis (Thus always to tyrants)



# Washington (SSUTA)

- WA provides a very clear guidance. <https://dor.wa.gov/get-form-or-publication/publications-subject/tax-topics/digital-products-including-digital-goods> WA recently prevailed in *Gartner, Inc. v. WA DOR*, 2020 WL 132904, P.3d (Jan. 13, 2020).
- TPP includes prewritten computer software, not customized software or specified digital products.
- The term “sale at retail” includes the sale of prewritten computer software . . . regardless of the method of delivery” including “the charge made to consumers for the right to access and use prewritten computer software, where possession of the software is maintained by the seller or a third party, regardless of whether the charge for the service is on a per use, per user, per license, subscription, or some other basis.” WA ST 82.04.050(6) (includes the right to access and use prewritten computer software to perform data processing).
- Digital products are (a) downloaded digital goods (music and movies); (b) streamed and accessed digital goods; and (c) digital automated services (DAS). The term “data processing” is elaborate and excludes storage, etc. WA states, “It is not necessary that a copy of the product be physically transferred to the purchaser. So long as the purchaser may access the product, it will be considered to have been electronically transferred to the purchaser.” WA ST 82.04.192(8). \*\*\*- A special exclusion for the use of audio or video programming provided by a radio or television broadcaster with an exception for a pay-per-program basis or for arrangement that allows the buyer to access a library of programs at any time for a specific charge for that service. - As such, an access to the library of video programs is not exempt (whereas the live TV is). WA ADC 458-20-15503

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
WA	Exempt.	Taxable.	Taxable.	Taxable. Remote access software (prewritten software that resides on the seller’s server or on a third party’s server with the buyer paying for access) is subject to tax.	Taxable.	Not taxable. Taxable network telephone services do not include cable or satellite television broadcasting.



## Digital products including digital goods

### What digital products are subject to tax?

Sales or use tax apply to all digital products, regardless of how they are accessed (downloaded, streamed, subscription service, networking, etc.). (See exclusions from the definitions and exemptions from retail sales and use tax below)

Digital products subject to sales or use tax include:

- Downloaded digital goods (music and movies, etc.)
- Streamed and accessed digital goods
- Digital automated services (DAS)

The laws also cover remote access software ("RAS") which is also subject to sales and use tax.

It does not matter if the purchaser obtains a permanent or nonpermanent right of use.

<https://dor.wa.gov/get-form-or-publication/publications-subject/tax-topics/digital-products-including-digital-goods>



# Washington (SSUTA)

## Definition of terms

### What is a digital product?

- It is transferred electronically.
- Digital goods (movies and music, etc.)
- Digital automated services (services that have been automated)

### What is a digital good?

- Data
- Facts
- Information
- Sounds (music)
- Images (movies, pictures)
- Any combination of the above.

When these are transferred electronically, they are digital goods.

<https://dor.wa.gov/get-form-or-publication/publications-subject/tax-topics/digital-products-including-digital-goods>



# Washington (SSUTA)

## How does B&O tax apply to sales of digital products, digital codes, and RAS?

Taxpayers with nexus in Washington who sell digital products, digital codes, or remote access **software** sourced to Washington are subject to the B&O tax under the Retailing classification on the gross proceeds of retail sales and the B&O tax under the Wholesaling classification on the gross proceeds for wholesaling receipts. If digital products are licensed to someone who is not an end user, then those gross receipts are likely subject to the Royalties B&O tax.



<https://dor.wa.gov/get-form-or-publication/publications-subject/tax-topics/digital-products-including-digital-goods>





# Washington (SSUTA)

Digital goods do not include:

- The representation of a personal or professional service primarily involving the application of human effort
- Internet access
- Computer software
- Digital automated services (DAS)
- Remote access software (RAS)

## What are digital automated services (DAS)?

DAS are services that use one or more software applications and are transferred electronically. DAS includes software, but it is not merely software. A DAS will frequently include data, information or additional functionality/services (e.g. chat rooms, multiplayer capabilities etc).

Examples include:

- Photo sharing services
- Car history report services
- A service that crawls the internet and gathers, categorizes and stores information

**Note:** Services that are primarily the result of human effort performed in response to a customer request are not considered DAS.

<https://dor.wa.gov/get-form-or-publication/publications-subject/tax-topics/digital-products-including-digital-goods>




# Washington (SSUTA)

- [Report](#)
- Sales revenue (in billion): 10.9
- Population (in million): 7.535
- Per capita sales tax: 1447
- Olympia
- Democratic
- Alki , or By and by



# Wisconsin (SSUTA)

- Imposes sales and use tax on specified digital goods, additional digital goods (greeting cards, finished artwork, periodicals, video or electronic games, and newspapers or other news or information products), and digital codes. W. Ault, K. Phillips, 28-Jul J. Multistate Tax'n 16, 16 (citing Wis. Stat. §§ 77.52(1)(d), 77.51(1a), 77.51(3pc)).
- Allows taxation of software no matter how delivered, yet on its website, Wisconsin addresses cloud computing and SaaS and indicates that software accessed in that manner would not be taxable unless the employees were on premises and controlled it, etc. Wisconsin also taxes cable TV. Strangely, when clarifying whether the delivery of specified digital goods (SDG) makes a difference, Wisconsin's website provides that electronic transfers (ET) include uploading, streaming, emailing, and that retaining a copy is not indicative of whether there is electronic transfer.
- Wisconsin has been described as one of the most aggressive states in the pursuit of digital product taxation.
- [\*Janesville Data Center v. Wisconsin Department of Revenue\*](#), 84 Wis.2d 341 (1978) (taxpayer wins, magnetic tapes - intangible coded info)

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
WI	Exempt.	Taxable. The manner in which computer programs are transferred is irrelevant.	Taxable.	Not taxable (?) Charges for accessing prewritten computer software located on vendor's server, if the customer does not have access to or control over the vendor's server, are not taxable.	Taxable.	Taxable. 



# Wisconsin (SSUTA)

## 5. How does Wisconsin treat the following cloud computing components?

### A. **Software as a Service (SaaS)** - Service provider hosts software application over the internet.

Charges for accessing prewritten computer software located on the vendor's server, if the customer does not operate the vendor's server, or control its operation and does not have physical access to the vendor's server, are not taxable. This assumes the service provider is not providing a taxable service (for example, a telecommunications message service) in the transaction.

#### **Note:**

- Charges for prewritten computer software that is downloaded to the customer's equipment (or equipment that the customer has access to and control over) in Wisconsin are taxable.
- Charges for prewritten computer software that is downloaded to the customer's equipment (or equipment the customer has access to and control over) outside of Wisconsin, with the customer's subsequent use of the prewritten software occurring in Wisconsin, are taxable.

### B. **Infrastructure as a Service (IaaS)** - Service provider owns, maintains, operates and houses equipment (that is, hardware, servers, network components) used to support a customer's operations. Customer uses the internet to access the equipment.

Charges for storage on someone else's server that the customer doesn't have control over or physical access to are not taxable.

**Note:** Charges for the use of equipment (i.e., servers and other hardware) that the customer has control over and physical access to are taxable.

### C. **Platform as a Service (PaaS)** - Platform as a service contains elements of both IaaS and SaaS. The tax treatment depends on the factors mentioned above.

<https://www.revenue.wi.gov/Pages/FAQS/pcs-computerc.aspx#c3a>



# Wisconsin (SSUTA)

State of Wisconsin  
Department of Revenue

## Important Changes

- Menominee County tax begins April 1, 2020
- Baseball stadium district tax ends March 31, 2020
- Outagamie County tax begins January 1, 2020
- Calumet County tax begins April 1, 2018
- Brown County tax begins January 1, 2018
- Kewaunee County tax begins April 1, 2017
- Sheboygan County tax begins January 1, 2017
- Brown County football stadium tax ended September 30, 2015

# Digital Goods

**How Do Wisconsin Sales and Use Taxes  
Apply to Sales and Purchases of Digital  
Goods?**

<https://www.revenue.wi.gov/DOR%20Publications/pb240.pdf>



# Wisconsin (SSUTA)

## 1. What are digital goods?

A "digital good" can be any product transferred electronically to the purchaser, other than prewritten computer software.

Digital goods include versions of products historically produced and transferred as articles of tangible personal property that are now produced and transferred electronically as digital files. In many cases, a digital good is also available for transfer as an article of tangible personal property. However, it is not necessary for a digital good to have a tangible counterpart in order to be a digital good.

A digital good can be a transmission of sound, images, or both, such as a live radio or television broadcast, regardless of whether the transmission is an analog signal or a digital signal. A digital good can be previously recorded sounds or images such as music, movies, or video or electronic games transferred electronically to customers by retailers of such products.

**Example:** Recorded music has been produced and sold in the form of vinyl LPs, cassette tapes, and CDs. More recently, recorded music has been produced and sold as a digitally-encoded file which is transferred electronically to the purchaser. Recorded music transferred electronically is a digital good.

## 2. What does it mean to be transferred electronically?

"Transferred electronically" means accessed or obtained by the purchaser by means other than tangible storage media.

Typical means of transferring a digital good electronically to a purchaser include uploading the digital good using the Internet, streaming the digital good over the Internet, and emailing the digital good to the purchaser. A digital good is transferred electronically regardless of whether the purchaser is allowed to make or retain a copy of the digital good.

## 3. Are sales of digital goods in Wisconsin subject to Wisconsin sales and use tax?

Wisconsin's sales and use taxes apply to the sales of and the storage, use, or other consumption of "[specified digital goods](#)", "[additional digital goods](#)", and "[digital codes](#)" as defined under Wisconsin's sales and use tax laws.

## 4. What law imposes the tax on digital goods?

[Section 77.52\(1\)\(d\)](#), Wis. Stats., provides the following:

<https://www.revenue.wi.gov/Pages/FAQS/ise-diggoods.aspx>



# Wisconsin (SSUTA)

- [Collections](#)
- Sales revenue (in billion): \$5.7
- Population (in million): 5.813
- Per capita sales tax: 981
- Madison
- D/R
- Forward





# West Virginia (SSUTA)

- West Virginia does not offer much guidance on its website.
- The review of its statutes reveals that West Virginia taxes all types of software but no digital goods.
  - However, West Virginia appears to tax television and broadcasting services (sales/use tax depending on the location of broadcasters – instate or out-of-state). <https://tax.wv.gov/Documents/TSD/tsd372.pdf>
- Yes. SaaS is considered a taxable service in West Virginia.
- [\*Penn. & West Virginia Supply Corp. v. Rose\*](#), 179 W. Va. 317 (W.Va. 1988)(tax authority wins; software discs were tangible and exempt only if sold for resale)

	Custom Computer Software	Downloaded Computer Software	Prewritten Computer Software	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
WV	Taxable. However, the transaction is exempt if the software is incorporated in a manufactured product, is educational software, or is used in communication, high-technology, or an Internet advertising business.	Taxable.	Taxable.	Taxable. Consumer sales and service tax applies to furnishing of all services unless a service is specifically exempt.	Exempt.	Taxable. All other services, the furnishing of which is subject to state PSC control, are nontaxable.



# West Virginia (SSUTA)

- Quarterly Local Sales and Use Tax Distributions
- Sales revenue (in billion):
- Population (in million): 1.805
- Per capita sales tax:
- Charleston
- Republican
- Montani semper liberi Mountaineers are always free)



# Wyoming (SSUTA)

- “Tangible personal property” includes prewritten computer software. WY ST § 39-15-101.
- With respect to specified digital products, “A sale of specified digital products is only subject to the tax under this section if the purchaser has permanent use of the specified digital product.” Id.
- Thus, Wyoming requires permanent use as the criteria determining if software or specified digital products are taxable. The terms "lease" or "rent" require transfer of possession or control.

	Custom Computer Software	Downloa ded Computer Software	Prewritt en Comput er Softwar e	Software as a Service (SaaS)	Digital Products	Cable Satellite TV
WY	Exempt.	Taxable.	Taxable.	Not taxable.	Taxable.	Not taxable.



# Wyoming (SSUTA)

- [Annual Report](#)
- Sales revenue (in billion): \$0.5
- Population (in million): 0.577737
- Per capita sales tax: 865
- Cheyenne
- Republican
- Equal Rights



# History re Taxability of Software (Intangible)

- The first case generally recognized as addressing the tangibility of computer software for tax purposes was *District of Columbia v. Universal Computer Assoc., Inc.*, 465 F.2d 615 (D.C.Cir.1972), which held computer software to be intangible, and therefore not taxable. The cases following soon thereafter, likewise held computer software to be intangible for sales, use and property tax purposes.
  - See e.g. *State v. Central Computer Serv., Inc.*, 349 So.2d 1160 (Ala.1977);
  - *County of Sacramento v. Assessment Appeals Bd. No. 2*, 32 Cal.App.3d 654, 108 Cal.Rptr. 434 (1973);
  - *First Nat'l Bank of Springfield v. Dep't of Revenue*, 85 Ill.2d 84, 51 Ill.Dec. 667, 421 N.E.2d 175 (1981);
  - *Greyhound Computer Corp. v. State Dep't of Assessments & Taxation*, 271 Md. 674, 320 A.2d 52 (1974);
  - *Commerce Union Bank v. Tidwell*, 538 S.W.2d 405 (Tenn.1976);
  - *First Nat'l. Bank of Fort Worth v. Bullock*, 584 S.W.2d 548 (Tex.Civ.App.1979).

*South Cent. Bell Telephone Co. v. Barthelemy*, 643 So.2d 1240 (La. 1994)



# History re Taxability of Software (from Intangible - Tangible)

- However, as computer software became more prevalent in society, and as courts' knowledge and understanding of computer software grew, later cases saw a shift in courts' attitudes towards the taxability of computer software, and courts began holding computer software to be tangible for sales, use and property tax purposes.
  - *This trend began with two cases decided just one day apart—Comptroller of the Treasury v. Equitable Trust Co., 296 Md. 459, 464 A.2d 248 (1983) and Chittenden Trust Co. v. King, 143 Vt. 271, 465 A.2d 1100 (1983).*
  - *The trend continued throughout the 1980's, see e.g. Citizens & S. Sys., Inc. v. South Carolina Tax Comm'n, 280 S.C. 138, 311 S.E.2d 717 (1984);*
  - *Hasbro Indus., Inc. v. Norberg, 487 A.2d 124 (R.I.1985);*
  - *Creasy Sys. Consultants, Inc. v. Olsen, 716 S.W.2d 35 (Tenn.1986);*
  - *Measurex Sys., Inc. v. State Tax Assessor, 490 A.2d 1192 (Me.1985); Bridge Data Co. v. Director of Revenue, 794 S.W.2d 204 (Mo.1990) (en banc );*
  - *Pennsylvania & West Virginia Supply Corp. v. Rose, 179 W.Va. 317, 368 S.E.2d 101 (1988),*
- though the trend was not uniform, see e.g. *CompuServe, Inc. v. Lindley, 41 Ohio App.3d 260, 535 N.E.2d 360 (1987); General Business Sys., Inc. v. State Board of Equalization, 162 Cal.App.3d 50, 208 Cal.Rptr. 374 (1984); Maccabees Mut. Life Ins. Co. v. State Dep't of Treasury, 122 Mich.App. 660, 332 N.W.2d 561 (1983); Northeast Datacom, Inc. v. City of Wallingford, 212 Conn. 639, 563 A.2d 688 (1989).*

*South Cent. Bell Telephone Co. v. Barthelemy, 643 So.2d 1240 (La. 1994)*



# Commerce Union Bank v. Tidwell, 538 S.W.2d 405 (Tenn. 1976)

## Taxpayer wins, software – intangible knowledge, superseded by statute as stated in Lockheed Martin Energy Sys. v. Johnson, Tenn. Ct. App. (Jan. 31, 2002)

- Rather than develop, taxpayer bought software/programs (standard and with modifications).
- The information contained in these programs could be transferred:
  - *Manually at the location of the user's computer*
  - *By a remote programming terminal*
  - *Using punch cards, magnetic tapes or discs*
- **The Tennessee Supreme Court:**
  - Taxpayer bought information. The method of delivery should not matter. Here, the Tax Authority was not trying to tax downloaded software.
  - What remains in the computer is “intangible knowledge.”
  - Transfer of tangible personal property (e.g., tapes) is merely incidental.
- **The sale of software is NOT the sale of tangible personal property.**





## State v. Central Computer Services, 349 So. 2d 1160 (Ala. 1977)

AL, 1977, overruled by Wal-Mart Stores, Inc. v. City of Mobile (Nov. 27, 1996)

### (Taxpayer wins, software – information)

- Taxpayer paid \$236K to the university for 99-year license for 8 computer programs (set of instructions recorded on magnetic tapes or discs). Taxpayer extracted information from the tapes/discs and returned those.

The Alabama Supreme Court:

- Magnetic tapes and punched cards are distinguishable from movie films – needed the movie film itself to broadcast the motion picture.
- Once the information is transferred from a tape, the tape is no longer of any value.
- Agreed with Commerce Union Bank v. Tidwell, 538 S.W.2d 405 (Tenn. 1976)



## **Janesville Data Center v. Wisconsin Dep't of Revenue, 84 Wis.2d 341 (1978)**

- WI, 1978 (TP wins, magnetic tapes - intangible coded info)
- Data Center purchases keypunch cards from a supplier at a cost of \$1.06 per one thousand cards. 5% of customers supply their own cards.
- “Courts have had great difficulty in distinguishing dealings in tangibles from dealings in intangibles.”
- “Clearly, tangible property, that is cards, tapes, or print-outs, were transferred in the case at bar . . .” [based on persuasive authority of *Bullock v. Statistical Tabulating Corp.*, 549 S.W. 2d 166 (Tex. 1977)] “the object of the transaction was the sale of intangible coded information. . . .”



# **First Nat'l Bank of Fort Worth v. Bullock, 584 S.W.2d 548 (App. Tex. 1979)**

**Taxpayer wins, based on the “essence of transaction,” software was deemed intangible**

- The bank obtained licenses to use four programs, that is, software, which instructed the bank's computer to perform deposit and lending functions and process general accounting. The information was contained, as here, on magnetic tapes.
- The court stated that it would look to the “essence of the transaction” to determine whether the property purchased was tangible or intangible
- The court held that, since the information on the tapes could have been communicated in several different ways, and the computer could even have been programmed over the telephone or by hand, the essence of the purchase was not the tapes, but the process which enabled the computer to function. The software was therefore in essence intangible personal property and the bank was not required to pay a sales and use tax for the licenses it purchased. (584 S.W.2d 548, 551.)
- That court was not persuaded to make a distinction between custom and pre-written software.



## First Nat'l Bank of Springfield, 85 Ill. 2d 84 (Ill, 1981)

### Taxpayer wins, the court sees software differently than movies – calling it intangible

- The bank purchased five applicational programs from five different sources - a customer information application to enable the bank to compile information from all of the bank's accounting ledgers; a program to compute installment-loan payments; a program to compute commercial-loan payments; a librarian system; and an audit program.
- Taxpayer: the magnetic tapes are intangible personal property, because they are, in essence, merely a means of conveying programming instructions.
- Tax authority: the physical qualities of the tapes predominate over the information contained on them. The department compares the tapes to films, phonograph records and books. All three examples, the department argues, represent the physical manifestation of intangible ideas and artistic achievement, yet all three are taxable as tangible personal property.
- The court: *while those articles and the tapes are similar in that they physically represent the transfer of ideas or artistic processes, a more significant distinction is that those articles are inseparable from the ideas or processes, whereas computer programs are separable from the tapes. ...* The sale of computer software is the transfer of intangible personal property and, as such, is not taxable.



# Spencer Gifts, Inc. v. Director, 182 N. J. Super. 179 (N.J. 1981)

**(Taxpayer wins, tapes incidental to leasing information were not taxable)**

- **The issue is whether the rental of computer mailing lists by the taxpayer was exempt as rental of intangible property or the purchase of nontaxable service.**
  - The tapes are tangible personal property. It takes app. 1 minute for the computer to assimilate 10,000 names and addresses from a reel of magnetic tape; the reels of tape contain from 5,000 to 500,000 names.
  - The information may be transmitted via telephone, in which case the physical delivery of tapes would be unnecessary, or it can be provided on a typed list. The information goes on advertising wrappers for catalogues.
  - Taxpayer sold 1,000 names for \$30-\$35.
  - The rental charges are based on the quantity and quality of the information on the tapes.
- **Tax authority relied on New York's cases that the furnishing of information by printed, mimeographed or multigraphed matter ... in any other" is taxable.**
- **The court provided definitions:**
  - Software is a set of procedures ... concerned with the operation of a data processing system. Information is knowledge. Data is physical symbols used to represent information for storage, communication or processing. Data processing is used to produce data that provides people with information.
- **"Considering the distinction between software and information, the software cases are applicable by analogy but are not completely dispositive of the issue..."**
- **The court analyzed many cases applying the true object test and concluded that taxpayer was leasing information not tangible personal property. "[T]he form of delivery of the information should not control its taxability."**
- **"The inconsequential aspect of the magnetic tapes ... may be compared to the inconsequential aspect of the paper used in connection with an accountant's services by way of reports or with an attorney's services by way of wills, other legal documents..."**
- **The court also did not find that taxpayer engaged in taxable advertising services because it did not disseminate information.**



# James v. Tres Computer Systems, Inc., 642 S.W.2d 347 (Mo. 1982)

Taxpayer wins, the data and programs were intangible, but superseded by IBM v. Director of Rev. (Mo. 1989)

- **Taxpayer sold computer software to a Missouri customer through the use of tapes containing data and programs.**
  - “Given that there is no dispute that the data and programs sold are intangible personal property, the question is whether, by their presence on the tapes, they could become tangible personal property so as to be taxable under § 144.610, RSMo 1978.”
  - “Most of the difficulty present in resolving the question before us is attributable to the necessity of employing the word ‘tangible’, a word obviously associated with simple human sensory perception, to analyze a problem set in a background of high technology. We recognize that computer technology is rapidly developing in complexity and, therefore, do not intend to formulate a fixed, general rule which later could have unpredictable results.”
- **The court looked at the ultimate object of the sale, at the need to have tangible medium to transfer.**
- **Dissent: “Once used, they too can be discarded. Of prime importance here is the use, not the ultimate fate of tangible personal property purchased.”**



## Chittenden v. King, 143 Vt. 271 (Vt. 1983)

### Tax authority wins, the computer software tape is tangible as it can be seen and is off the shelf)

- Bank owe tax on the purchase of a computer software tape. The program enabled the bank's computer to keep records and perform accounting functions and it was a standard off the shelf software. The tax authority claimed that the software was clearly tangible personal property.
- “The tape can be seen, weighed, measured and touched... and is not a right or credit.” The court rejected the notion that it was dealing with a service type transaction when the program was off the shelf.
- The films, videotapes, books, cassettes and records' value lies in their ability to store and later display or transmit the content. A computer software tape is no different.



# Comptroller of the Treasury v. Equitable Trust Co., 296 Md. 459 (App. 1983)

(Tax authority wins, software - tangible, taxability should not turn on whether the buyer stores program in memory, or may have been structured in nontaxable form)

- **Taxpayer licensed tow software programs.**
  - A computer is a machine. It does not think. A program is a set of instructions that has to be developed with knowledge, time and effort.
  - A canned program saves time – no need to reinvent the wheel.
  - Each program was delivered via a magnetic tape, after a copy is loaded into memory.
- **Taxpayer claims the essence was to obtain intangible program and not the tape.**
- **The purpose of the license agreement is to protect trade secrets. The license erects contractual limitations on the use of the software.**
  - The form of transaction or how a program stored should not change taxability.
  - IRS position: bundled software is treated as part of the hardware; unbundled – intangible.
- **At the administrative level, at least 36 states imposed a sales tax on software transfers as of 1981 (24 states – both canned and custom; 10 states – canned software only). (1) software rearranges computer's memory; (2) no severability between a copy of the program and its recording.**
- **“Both recorded music and computer programs are sets of information in a form which, when passed over a magnetized head, cause minute currents to flow in such a way that desired physical work is accomplished.”**





# Maccabees Mut. Life Ins. Co. v. Dep't of Treasury, 122 Mich. App. 660 (1983)

**(Taxpayer wins; taxpayer offered expert witness to show that software was customized)**

- Taxpayer, the insurance company, sought refund in connection with its use of computer software programs in its data processing department.
- The court found that the software was intangible based on the testimony of an expert witness that the value of any tangible personal property attendant to software was inconsequential, and that although some software requires no training or support to install, the program at issue was customized and needed consulting, on-sight updating and was not an end product.



## **Citizens & Southern Sys. v. S.C. Tax Comm'n, 280 S.C. 138 (S.C. 1984)**

- **(Tax authority wins; the form of transmitting software matters, software was tangible)**
- **Taxpayer filed for a refund claiming that computer software was intangible.**
- **Computer software = instructions and directions that enable a computer to perform functions. The information may be carried in different ways – tapes, telephone, punch cards or personal programming. Once the information is transferred, the type is of negligible value.**
  - The Court agreed that the sale of magnetic tapes is like a sale of books or phonograph records. “[I]f the professor were to convey knowledge or information to students in person, a sales tax would not be assessed upon the fees... if the professor published that knowledge or information in a book . . . , a sales tax would be assessed.”
  - The Court that separability of the program from the tape versus of the book cover and book content is not relevant, i.e., the taxability “should not turn on whether the buyer stores the program in memory.”
  - “A tax system cannot be administered dependent upon whether or not, at the time of the transaction, the buyer’s intent is to store the program continuously in memory.”
- **The Court agreed with Chittenden Trust Company v. King, 465 A.2d 1100 (Vt. 1983) and the idea that the choice of transmitting information via tangible medium is dispositive (it is not how a transaction could have been structured, but how it actually occurred).**



# **Measurex Systems, Inc. v. State Tax, 490 A.2d 1192 (Maine 1985)**

## **(Tax authority wins; canned software is tangible personal property)**

- **Taxpayer is a supplier and lessor of computer systems and leased its systems to paper companies for 102 months on a condition that they could renew the lease or purchase the equipment for 25% of the original cost.**
  - One issue was whether the lease was exempt as the lease in lieu of purchase.
- **The other issue was whether the software was “off the shelf” or “canned” or “custom,” i.e., prepared for a specific customer’s needs and not easily transferable to others.**
- **Three paper companies purchased substantially the same software – which therefore was found to be off the shelf and taxable.**



## **CompuServe, Inc. v. Lindley, 41 Ohio App. 3d 260 (1987)**

**(Taxpayer wins. Software is intangible if it is an application software.)**

- Taxpayer maintains a bank of computers and provides computer related services to customers who access via dialing and connecting to a communication processor.
- Taxpayer offered computer hardware, and two types of software: operating systems (instructions to hardware how to operate) and applications (helping to solve a particular task).
  - Taxpayer described the process of creating software and transmission, which could occur by typing, electronically transferring over a telephone line, or using inexpensive storage devices.
  - The Ohio court identified courts that determine software is intangible (AL, MO, CA, KS) and the reasons (1) software can be transferred manually, electronically – no tangible medium; (2) unlike a movie film that is necessary for broadcasting, once the software is transferred, no medium is needed; and (3) the customer wants information, not the tapes.
  - The Ohio court also identified courts finding software to be tangible (SC, RI, VT, MD).
- Ohio determined the method of software transfer should not matter, and that it is intangible property. However, the court determined that operational software enhances the value of hardware, tangible personal property is therefore taxable because without it, “the hardware cannot function.”



## **Penn. & West Virginia Supply Corp. v. Rose, 179 W. Va. 317 (W.Va. 1988)**

### **Tax authority wins; software discs were tangible and exempt only if sold for resale**

- Taxpayer, a wholesale company, sold equipment including standardized computer software discs, including periodic updates and modifications.
- The court found that computer software discs were capable of being touched, dismissing the argument that the discs had little value, or that taxability should depend on separability of software from discs.
- Two percent of sales were made at retail to consumers, so apportionment is necessary between software used in retail versus wholesale business.



## **In the matter of AT&T Technologies, Inc., 242 Kan. 554 (Ka. 1988)**

### **(Taxpayer wins; the phone company was the end-user of the equipment)**

- AT&T furnished telephones to Bell including repair services.
- Sales tax applies to service of repair of tangible personal property which is not being held for sale in the regular course of business.
- Businesses (hotels, airlines, bowling alleys, etc.) buy equipment that is later leased in exchange for charges; when such equipment is acquired, it is not sale for resale when the primary function is to provide services, so that it is the taxpayer who is the ultimate user or consumer.



# **Int'l Business Machines Corp. v. Missouri, 765 S.W. 2d 611 (Mo. 1989)**

## **(Tax authority wins; no evidence software was service)**

- **IBM offered software to customers and sought refund. The Supreme Court of Missouri found some courts (TN, IL, MD, MI, AL, TX, CA, KS) treating software as intangible and others (VT, MD, SC, WV, RI) as tangible.**
  - “The wide divergence of results demonstrates . . . the necessity for state legislatures updating their taxing laws in terms of modern technology. The divergent results suggest that as a matter of policy, a good case can be made for taxing the use of all software, none of the software, or only part of the software.”
- **The evidence demonstrated that IBM used catalogues and any modifications to the software were minimal.**
  - The manner of program delivery (the possibility of delivery via telephone lines) was not before the court as IBT only stipulated that its software was delivered via tangible medium.
- **The court found no evidence that the software was customized or service.**



# Mark O. Haroldsen, Inc. v. State Tax Comm'n, 805 P.2d 176 (Utah 1990)

(Tax authority wins, the mailing lists provided on magnetic tapes were tangible; the “alternative means” test or “the essence of transaction” test did not make the transaction nontaxable)

- Taxpayer used the services of brokers who provided him with mailing lists printed on sheets of paper or magnetic tapes for purposes of direct mailing advertising. Tax authority found that the purchase and lease of the lists was taxable.
- The issue is whether the sale/lease of mailing lists is the sale/lease of tangible personal property when some personal service to compile was required, and the value is more in the information and not in the physical medium used to convey the information.
- Taxpayer argued against taxability relying on the “essence of the transaction” test, and an “alternative means test,” suggesting that because the mailing lists can be conveyed using intangible media, the essence of the transaction intangible.
- The Utah Supreme Court pointed out that a number of courts (AL, MO, OH, TX, WI) found that the data was the essence of the transaction, while the other courts (MO, OH) held that the medium was the essence. The Utah Court noticed, “A Picasso painting is personal property, but its value is hardly the value of the canvas, the frame, and the paint.” The Utah Court found more convincing the logic in *Equitable Trust*, Maryland court stated that information should not be severed from the medium, and that “a computer program is read by a computer, just as a phonograph record is played by a player or a film is shown by a projector.”
- The Court held that the medium of transfer is dispositive, and the taxability should not depend on how a transaction could have been structured.
- Also, while some personal service was provided in selecting and modifying the lists, these services were not the essence of the transaction.





# Navistar Int'l Trans. Corp v. Bd. Of Equalization, 8 Cal. 4th 868 (Ca. 1994)

(Tax authority wins; the documents and programs were tangible personal property; the fact that taxpayer developed software did not change taxability determination when it was sold to a third party)

- Taxpayer, an industrial turbine engine company, sold its assets, including computer programs for financial accounting, business operations, economic forecasting, etc., which it had developed. Taxpayer argued that it sold primarily intellectual content and relied on the “true object” test.
- The Court discussed the situation when an intangible right may be evidence or represented by a physical object such as a promissory note or a certificate of stock – stating that the existence of the physical object does not change the nature of the right as intangible.
- The Court discussed *Simplicity Pattern Co. v. State Bd.*, 27 Cal. 3d 900 (1980) (in the case of the sale of film negatives to make audiovisual materials, the court rejected an idea that a sale becomes nontaxable when the primary purpose is to transfer intangible content). The Court stated that the buyer bought the documents for their own sake. Even the fact that these programs were characterized as intangibles on the federal tax returns not dispositive.
- The Court also found that even though the software was developed by taxpayer for its own use, it was subsequently sold to a third party.



# **South Cent. Bell Tele. Co. v. Barthelemy, 643 So. 2d 1240 (La. 1994)**

**(Tax authority wins; application software; receipt of arrangement of matter - tangible and taxable)**

- **“Tangible personal property” is defined in § 56–18 of the City Code as follows: [P]ersonal property which may be seen, weighed, measured, felt or touched, or is in any other manner perceptible to the senses.**
  - The City Code's use tax is synonymous with corporeal movable property as used in the Louisiana Civil Code.” 532 So.2d at 1383. . . . [T]he civilian concept of corporeal movable encompasses all things that make up the physical world; conversely, incorporeals, i.e., intangibles, encompass the non-physical world of legal rights. . . . Software basic characteristics: The software at issue is not merely knowledge, but rather is knowledge recorded in a physical form which has physical existence, takes up space on the tape, disc, or hard drive, makes physical things happen, and can be perceived by the senses.
  - The software itself, i.e. the physical copy, is not merely a right or an idea to be comprehended by the understanding. The purchaser of computer software neither desires nor receives mere knowledge, but rather receives a certain arrangement of matter that will make his or her computer perform a desired function. This arrangement of matter, physically recorded on some tangible medium, constitutes a corporeal body.
  - The license to exhibit the films was inseparable from the tangible film prints. Likewise, the license to use the software, without transferring the software, would be of no use to Bell, and the license to use the software is inseparable from the physical manifestation of the software in recorded form.
- **The Supreme Court disagreed with “the essence of transaction” approach or that computer software constitutes “intellectual property” and thus classified such software as an incorporeal under Louisiana Civil Code article 461. . . [T]his reasoning confuses the corporeal computer software copy itself with the incorporeal right to the software. . . . LA declined to adopt the canned versus custom distinction invoked by a few state legislatures, commentators and courts. [One] problem with the custom/canned distinction, as illustrated by the facts in this case, is that often the software at issue is mixed, i.e., canned software is modified to the buyer's specifications, and fits neatly into neither category.**



# South Central Utah Tele. Ass'n, Inc. v. Auditing Div. Utah, 951 P.2d 218 (Utah 1997)

**(Tax authority wins; the telephone company did not rent its equipment to subscribers who accessed the dial tone; the software did not become intangible once installed; and the software maintenance agreements did not require performance to be subject to tax as the warranty agreements)**

- **Telephone Equipment Purchases:** Taxpayer takes a position that it is not subject to tax based on the “sale for resale” exemption, stating that “dial tone charges that appeared on the subscribers’ monthly bill were rental payments from subscribers for the use of the telephone equipment” it purchased.
  - Tax authority claimed that taxpayer was the end-user charging customers for a service and not someone who leased or rented the equipment to subscribers.
  - Taxpayer claimed that once subscribers obtained a dial tone, taxpayer had “no control” over the manner in which the equipment was used. However, no evidence that taxpayer was not the ultimate consumer, end-user of the equipment. The Supreme Court stated that characterizing the relationship between subscribers who had no contractual right to the equipment but only services as a rental arrangement “ignore[ed] both the form and the substance...”
- **Software Maintenance Agreements:** Taxpayer claimed that 1) the software becomes intangible after installation so that any maintenance is exempt because it is not “repair or renovation,” and (2) agreement to provide service in the future is not a taxable transaction in the present.
  - The Supreme Court of Utah disagreed with taxpayer’s argument that the installation of software changes its nature. “A software is a series of magnetic or electronic signals recorded and stored either internally (e.g., in the computer’s hard drive or on the network) or externally (e.g., on floppy discs or magnetic tapes). The signals are not changed when transferred from one media to the next.
  - The Supreme Court distinguished warranty agreements from the agreement for software maintenance because the statute did not contain reference to “performance” of services.



**(Taxpayer wins; a party fabricating software for its use even if titled transfer to the government not subject to tax)**

- Taxpayer, Energy Systems, performed services for the federal government, and designed software to assist it in performing its duties.
  - The title to all tangible personal property, including software, passed immediately to the federal government.
- Per T.C.A. 67-6-102(25)(B), “sale” means transfer of customized/packaged computer software, which shall be considered tangible personal property; however, the fabrication of software for person’s own use/consumption shall not be considered a taxable “use.”
- Taxpayer fabricated and used software in operation of its own business, so subject to the exception – not taxable.



# City of Boulder v. Leanin' Tree, Inc., 72 P.3d 361, 362 (Colo. 2003)

## (Taxpayer wins; the right to use art in manufacturing is intangible)

- **Leanin' Tree entered into license agreements with artists whereby it borrowed their artwork and received the exclusive right to reproduce and publish the images.**
- **The court applied the “true object” test.**
  - The Supreme Court found that the transaction was not like the typical purchase of a work of art, and did not include the transfer of title and possession with a right to resell or exhibit the artwork, or any enjoyment from the finished product of the artist at all. Rather, it involved granting “a right to use the image created by the artist in creating a new tangible object, which may be subject to sales and use tax.”
  - Consistent with this objective, the artist is not paid a lump-sum for his artwork or even for the use of his artwork as a lease agreement. Rather, he is compensated for his contribution to the production of the finished product, in the form of royalties or entitlement to a percentage of the ultimate sales. . . [that] resemble the purchase of a right to edit and publish rather than the sale of artwork.
- **The dissenting judge pointed out that the purpose or nature of the transfer or payment should not matter, but the form of the product – since the buyer needed to use the physical artwork, the transaction should be taxed.**



# Colorado - General Information Letter, 2011 WL 10755855, at \*2

## 2. Monthly newspapers delivered electronically are subject to sales tax.

Newspapers that do not qualify as a legal publication are not exempt from sales and use tax, regardless of whether they are delivered electronically. As we noted above, Colorado levies sales and use tax on the sale, use, storage, or consumption of tangible personal property.<sup>2</sup> Intangible personal property is conceptual in nature, such as a contract, stock, and goodwill.<sup>3</sup> When we speak of digital goods, we are referring not to a concept but, rather, to something that exists in the physical world. Just as a digital song or digital photograph stored and played or displayed on an electronic device is physical property that is perceptible by the senses, a newspaper electronically delivered is also part of the physical world.

We acknowledge that this is a complex and unsettled area of tax. Indeed, the department's view of electronically delivered software has varied over the years. In the absence of clear legislative direction on this issue, the department must evaluate this issue in light of existing statutes. Digital documents, as is true of digital photographs, music, books, movies, and newspapers, have a physical existence and are no less taxable than had they been delivered in paper or celluloid form.

A number of states that have addressed this issue have reached similar conclusions. See, e.g., Arizona Private Taxpayer Ruling LR05-010, 09/26/2005; Wisconsin Sales and Use Tax Report No. 1-09, 03/01/2009 (describing statutory changes that impose sales tax on certain digital goods); *Robert Smith Flipflopfoto 116 S. 8th Street Opelika, AL 36801-4914, Taxpayer, v. State of Alabama Department of Revenue.*, S. 05-1240, 11/17/2006 (digital photographs are tangible personal property subject to sales tax; Texas Policy Letter Ruling No. 200101966L, 01/03/2001 (digital photographs are tangible personal property); Washington Other Official Material / Digital Products March 3, 2010 (electronically downloaded digital products are taxable tangible personal property).





# **Graham Packaging Co. v. Penn., 882 A.2d 1076 (Pa. 2005)**

**(Tax authority wins, software renewals are taxable, taxpayer received “physically arranged matter that animated computers” – reliance on LA case in South Central Bell)**

- **Taxpayer designs customized blow-molded plastic containers; taxpayer paid to Dell for multiple licenses’ renewals.**
  - Before 1997, PA specifically taxed “computer programming services,” and taxed canned software as tangible personal property. After 1997, the sale at retail no longer included custom computer-related services, and a policy was issued stating that these services are no longer taxable. In 2000, the department issued a ruling that was inconsistent stating that software transmitted electronically is not subject to tax because it does not have a physical material body.
- **Taxpayer relied on deletion of custom software from the statute and 2000 policy.**
- **Tax authority stated that the license to renew should be treated as the license to originally acquire and since the software was acquired on the disk, the software is taxable.**
- **The Court does not agree with either party.**
  - The Court points out (a) some jurisdictions focus on the form of manner in which software is transferred (Citizens & S. Sys. v. S. Carolina Tax (1984); Chittenden, Vt (1983); Mark Haroldsen, Utah (1990)); (b) other jurisdictions follow the “true object” test (First Nat’l Bank, TX (1979), NE Datacom, CT (1989), CompuServe, OH (1987), Globe Life, OK (1996), but S. Central Bell v. Barthelemy, LA (1994); (c) “incidental to service test” – Catalina Mrtg, MI (2004).
- **PA goes to reject the method-of-delivery approach, finding not much difference between the true essence and incidental to service tests. PA choose to look at the nature of the product, and value received.**
- **The Court holds, “the sale of all canned software, whether transmitted electronically or on a physical medium, is taxable as the sale of tangible personal property.”**



## **Dechert LLP v. Commonwealth of Penn., 922 A.2d 87 (Pa. 2007)**

**(Tax authority wins, reaffirming Graham, rejecting an argument that license to use canned software intangible)**

- Taxpayer provides legal services and paid taxes for canned software. Taxpayer sought refund arguing that the tangible media is of no value but that consideration was paid for intangible intellectual property rights.
- The court rejected the argument based on Graham Packaging case.





## **Dell, Inc. v. Super. Court, 159 Cal. App. 4th 911 (App. 2008)**

### **(Consumers win; in mixed transactions, the burden of proof is on the taxpayer)**

- **Consumers sued Dell and Dell cross-complained against California.**
- **Defendants agreed that Dell service contracts are taxable because the invoice is for lump sum to include the product and services if any.**
- **The Court found:**
  - “Bundled transactions are distinguishable from mixed transactions where goods and services are sold together yet are readily separable. . . . Unlike bundled transactions, the goods and services in a mixed transaction are distinct (not intertwined) and each is a significant object of the transaction (not incidental)... Taxpayer bears the burden of proof concerning the right to a tax exemption. Dell is not required to itemize although it may help.
- **California has the power to require retailers to keep records and papers to identify the value of service contracts. Consumers paid more for these contracts.**



## Verizon North Inc. v. Combs, 308 S.W. 3d 1 (Tex. App. 2009)

(Tax authority wins; some configuration or customization for a purchaser specific intended use does not change that the program was sold as “complete”)

- Taxpayer claimed a refund on software that it asserted it did not purchase as a completed program.
  - 34 Tex. Admin. Code 3.308(b)(1) provides that “computer program” is a “series of instructions sold as a completed program which are coded for acceptance or use by a computer system...”
- Taxpayer argued that software had to be configured, modified and customized and therefore not sold as completed.
  - “[T]he focus is on the code and design of the software as sold, not on the intended use by the purchaser . . .”
- Because taxpayer admitted it would be possible to do zero computer programming, only configuration and run the program, the lower court correct found that the software was taxable tangible personal property.



# Ball Aerospace & Tech. Corp. v. City of Boulder, 304 P.3d 609 (Colo. App. 2010)

## (Tax authority wins; downloaded software is taxable, as is access to software used to access search engine to obtain information; interpretation of “machine-readable form”)

- Taxpayer lost at the hearing office but prevailed in the tax court on whether it owed use tax on its acquisition of downloaded software and access to online services. The Court of Appeals agreed with the tax authority/hearing officer.
  - The use tax is upon the privilege of using in the city, personally or as part of rendering a service, tangible personal property...
  - “Use” means “the exercise for any length of time . . . any right, power, dominion, or control over tangible personal property or taxable services . . .”
  - “Taxable services” covers computer software contained on cards, tapes, discs, coding sheets, or other machine-readable or human-readable form, including software that has been modified if the modification does not exceed 25% of the price of unmodified software.
- Taxpayer argued during the download, downloaded software was not contained on machine-readable form and therefore non-taxable:
  - “According to the affidavit . . . , software must be in binary format—a set of 1's and 0's—to be machine readable. Software stored on a vendor's server that is available for download is in binary format. During the download from the vendor's server, the binary values are converted into waves of electromagnetic energy, which are transmitted to the receiving computer, decoded, and used to reconstruct the proper sequence of binary values comprising the software on the receiving computer. . . . because the electronic signals comprising the download have no coherent boundary, are fleeting, and are not in binary format during transmission, the software is not ‘contained on’ any ‘form’ that is ‘machine-readable’ during the download.”
- The tax court erred by focusing on the method of conveyance – as long as the software is contained on machine readable form... at the time when the purchaser exercises any right, power, dominion – taxable.
- The tax court erred by not taxing online data services because “[w]hen accessing a commercial database, the customer is . . . granted a right to use the database host’s computer system and software,” when “the customer searches for certain material on the host’s webpage, he or she is using the host’s server and its search engine program.”



# Verizon Business Network Serv. v. Combs, 2013 WL 1343530 (Tex. App. 2013)

(Tax authority wins; taxpayer could not treat feature enhancements as improvements or maintenance when the invoice was for a lump sum feature enhancements that altered the software and when there was only one shipping address to Texas)

- Taxpayer paid a lump sum to vendors for software needed to replace its analog switches with digital switches. The feature enhancements were shipped to Texas and tested there before implemented nationwide.
- The lower court found that the feature enhancements were a computer program per Tax Code 151.0031. The Court of Appeals approved.
  - A computer program is subject to sales tax when transferred/possessed, or to use tax if stored, used or consumed.
  - Taxpayer claimed what it bought was maintenance necessary to update software, and that it should be apportioned to its principal place of business in DC, or, if not viewed as a service, the features were used outside Texas.
  - Taxpayer did not owe payment to vendors after testing or installation per agreement or invoice, but installation was provided at no charge as part of the lump sum.
- “Maintenance” means “error correction, improvements, or technical support.” Verizon read too much into the word “improvement,” as it does not cover any modification of software.
  - When the new software features altered the original capacity, then added a new functionality.
- In sum, any service was incidental to installation of feature enhancements, and taxpayer had no proof that software was to be shipped anywhere but Texas.



# Lumidata v. Commissioner of Revenue, 2013 WL 6834796 (Minn. Tax 2013)

## (Tax Authority wins; no evidence of “magnitude of alleged custom programming costs”; taxpayer fails to prove exempt costs for customization in bundled invoices)

- Taxpayer developed and licensed a software product SOLYS (allows suppliers to import a retailer’s POS info into a database, and query, manage inventory, etc.)
- Agreements: (a) charging a license fee and noting that some customization is required; (b) charging a license fee and stating that customization will be free of charge; (c) charging a license fee with no customization mentioned; and (d) expressly stating a fee for customization.
  - Tax authority only assessed tax on agreements (a)-(c) – 80 sales.
  - Taxpayer ultimately furnished documents for 50 percent of questioned transactions but this did not overcome the presumption of correctness.
- **SOLYS – a constantly evolving product.**
  - Taxpayer argued that “in substance—it gave SOLYS to purchasers free of charge, and that the ‘license fees’ expressly stated... were actually charges for custom programming.”
  - The Court rejected the “substance over form” argument by Taxpayer because “the characterization made by the taxpayer is not determinative.” Taxpayer offered conclusory testimony but failed to document on a project-by-project basis the time that its programmer spent writing custom enhancements.
- **Also, taxpayer had the burden of correctly applying Minnesota sourcing rules because it had to install and maintained SOLY and knew where the customer received it. The court affirmed imposition of late filing and late penalty fees.**



## **Normand v. Cox Communications, 167 So.3d 156 (La. App. 2014)**

### **(TP wins re: video on demand, pay per view are exempt cable services, not rentals of TPP)**

- **Video on Demand (VOD) and Pay per View (PPV) programming are not tangible personal property and are non-taxable services.**
- **Cox prevailed at the lower court and the court of appeals.**
- **The first issue: Tax Authority argued that VOD, PPV programs were computer software.**
  - Cox argued that the customers did not receive a license or any rights to the VOD/PPV. They were “data streams . . . to be interpreted by software or firmware,” where a customer cannot copy, download or store, only to stream real time from Cox infrastructure.
  - Tax Authority argued that VOD and PPV were subject to sales tax pursuant to lease or rental, La. R.S. 47:301(7).
  - Cox argued that “significant restrictions are placed on another’s right to use” such that “the use does not rise to the level of a taxable ‘right to use’ and no ‘lease or rental’ occurs.” Per Cox, VOD/PPV are a service and the customer cannot download, store, record, copy, etc.
- **The second issue: whether the cable television services, including VOD/PPV, were exempt services pursuant to La. R.S. 47:305.16, La. R.S. 47:301(29)(x)(vii). Television video programming services are exempt in Louisiana.**



**(Taxpayer wins; primary purpose – transfer of information services)**

- **Taxpayer sold information products, incl. CDs, software and on-line research tools. At issue is Checkpoint, an online tax and accounting research product.**
  - Taxpayer – nontaxable information service, or primarily the sale of a service.
  - The Court of Claims agreed with the tax authority, the case is about evolution of services – because the product was taxable when it was in book or CD formation, it was taxable. Also, the object is “information” which is “tangible personal property.”
  - The Court of Appeals reversed. See *Catalina Mktg. Sales Corp v. Dep’t of Treasury*, 678 N.W.2d 619 (Mich. 2004) (“incidental to service” six-factor test).
- **“Customers sought the expert knowledge of *Checkpoint’s* content creators in synthesizing, compiling, and organizing the materials, thereby rendering research more efficient.” Checkpoint sold taxable print and software products but also an information service. The main value of Checkpoint was the expert knowledge used to synthesize and compile the content. Non-taxable.**





# *Auto-Owners Ins. Co. v. Dep't of Treasury, 880 N.W.2d 337 (Mich.App. 2015)*

## (Taxpayer wins; no transfer of control incident to ownership)

- Contracts with West, Lexis Nexis, WebEx, LogMeIn, payment processing, etc.
- Taxpayer:
  - Software remained on third-party servers
  - Only information was transferred
  - No use occurred, and even if there was delivery and use, the use was incidental to services.
- “Use” is “the exercise of a right or power over tangible personal property incident to the ownership . . .”
  - “Deliver” means “to take and hand over to or leave for another: convey [.]” “Delivered by any means” encompasses electronic delivery.
  - If transfer of property was incidental to professional services: (1) buyer’s take on the object of transaction; (2) type of seller’s business; (3) profit-making motive; (4) whether the goods were available for sale without the service; (5) the extent to which the intangible services contributed to the value of physical item transferred; and (6) other factors.
- Data transfer is not transfer of software. Access to code was limited, not ownership-type with a few contracts.
- With the rest of the contracts (WebEx, LogMeIn), the required software was transferred electronically but minimal in light of the extensive computing and networking infrastructure supporting software operation.





## Level 3 Communications v. Penn., 125 A.3d 832 (Pa. 2015)

(Taxpayer wins; tangible personal property includes telecommunications--but not enhanced telecommunications which includes internet access)

- Taxpayer is an international Internet Service Provider (ISP) selling various services: local dial network, telephone numbers and modems, for ISPs desiring to outsource the remote access to their network/internet. AOL purchased the service to provide internet access to AOL's dial-up end-users.
- Point of Presence is an access point that connects to and helps other devices to connect to the internet access.
- Internet access is exempt in PA, as enhanced telecommunications and not within the definition of "tangible personal property." 61 Pa. Code 60.20(a); 72 P.S. 7202.



## **Nortel Networks Inc. v. Board of Equalization, 191 Cal.App.4th 1259 (2011)**

**(Taxpayer wins; Prewritten computer software is taxable if not subject to a copyright to patent and is held for general or repeated sale).**

- Nortel designs, manufactures and sells switch hardware to Pacific Bell Telephone Company. Nortel's licensing agreements forbid Pacific Bell from giving a copy of the software to third parties. The basic code is “never” available for general sale or lease. Nortel did not license to Pacific Bell the right to use the basic code. The basic code—without more—is incomplete and unusable. It needs further work of creating parameters, translations for each geographic region, etc. and requires some 400 hours of work.
- Substantial evidence supports the trial court's findings that the basic code is not a computer program because it is not “the complete plan for the solution of a problem.” Four-hundred hours of programming labor are necessary to merge the basic code with site-specific information to create a functioning software.
- Not every software program qualifies as a TTA: Only the transfer of a program that is subject to a patent or copyright is a TTA.
- The Board exceeded its authority by excluding all prewritten computer programs from the definition of a TTA, even the licensing of a prewritten program “that is subject to [a] patent or copyright interest.” (§§ 6011, subd. (c)(10)(D), 6012, subd. (c)(10)(D).)



# Lucent Technologies, Inc. v. Board of Equalization, 241 Cal.App.4th 19 (2015)

## **(Taxpayer wins; the burden of proof issue and California TTA exemption)**

- Per California law, technology transfer agreements are not subject to tax.
- CA follows “essential” or “physically useful” to the buyer’s subsequent use test to determine whether the intangible component of the transaction is taxable.
  - In 1993, CA enacted the technology transfer agreement “TTA” statutes by excluding them from the definition of “sales” if three requirements: (1) a person has a patent/copyright interest; (2) assigns/licenses to another person the right to make/sell a product or use a process; (3) which is subject to a patent/copyright.
- Tax Authority argued (1) the software was tangible personal property (microscopic alterations on the media); (2) even if not, the contract between AT&T/Lucent was not TTA because (a) no transfer of “meaningful” cluster of IP to telephone companies, and (b) taxpayer did not prove that the use of software without licenses would be copyright/patent violation. (3) If TTA, taxpayer did not establish the cost of developing software.
- CA expressly rejected LA view in *South Central Bell Tel. Co. v. Barthelemy*, 643 So.2d 1240, 1244 (La. 1994); and refused to “engraft” requirements into TTA statutory language.
  - A seller need not refute all possible copyright and patent defenses that the buyer could have applied to the unlicensed use of the product to establish that the transfer of the product meets the statutory definition of a technology transfer agreement exempt from sales tax. Cal. Rev. & Tax. Code §§ 6011(c)(10)(D), 6012(c)(10)(D).



**(Tax Authority wins, the issue is of the scope/application of bulletins)**

- In 10/25/2016 opinion, the New Jersey tax court held that services performed in connection with prewritten computer software were not taxable prior to October 2005 because the law making prewritten computer software taxable as “tangible personal property” (even if delivered electronically) was enacted in October 2005.
- Defendant (“Taxation”) contends that the court erred in so concluding because the newly enacted law simply enumerated what was always taxable, therefore, the court must affirm that portion of Taxation's sales tax assessment for the period January 2004 to October 2005. Taxation contends that the statute was amended merely to conform to the Streamlined Sales and Use Tax Agreement (SSUTA), which required member States to use common definitions, one of which was pre-written computer software. Thus, per Taxation, the inclusion of this term in the definition of “tangible personal property” in the S & U Act was not a new tax on prewritten computer software.
- In Technical Bulletin 51, Taxation provided notice regarding taxability. Courts have considered bulletins issued by Taxation as “guidance.” *See Tozour Energy Sys. v. Director, Div. of Taxation*, 23 N.J. Tax 341 (Tax 2007). Note that a bulletin will not be considered persuasive if it announces a new policy but with retroactive effect. *Residuary Trust v. Director, Div. of Taxation*, 28 N.J. Tax 541, 547–548 (App. Div. 2015).



**(Tax Authority wins, configuration is not customization/modification esp. when not separately invoiced)**

- **Taxpayer offered several software products to hospitals.**
  - The invoices submitted by Taxpayer included a single purchase price for the canned software and the customization of the canned software, so DOR determined that the entire purchase price was taxable.
- **Taxpayer's witness testified that taxpayer implemented its software products in a way that is unique to the customer.**
  - The implementation did not involve programming although the software would be inefficient if it was not customized to each customer. Clients did not have the level of authority to perform configuration on their own.
- **Under Alabama law, buying a canned software and modifying it is treated as customized software to the extent of modification.**
  - The issue was whether the vendor needed to allocate its charges if it modified canned into custom software.
- **Because the software was purchased as a product available to multiple customers and was later implemented to meet the taxpayer's specifications, that transaction was taxable.**
  - A hospital was not entitled to a refund of sales tax. Ala. Admin. Code r. 810-6-1-.37(5).



# Alabama – continued – pre-2020 Administrative Rule

- (1) Computers and related equipment, also known as computer hardware, consist of components and accessories that make up the physical computer assembly. The retail sale of computer hardware is subject to sales or use tax. The rental of computer hardware is subject to rental tax.
- (2) The term “computer software” as used in this regulation shall mean a sequence of automatic data-processing equipment instructions necessary to solve a problem, and includes both system and application programs and subdivisions, such as assemblers, compilers, routines, generators and utilities.
- (3) The term “canned computer software” as used in this regulation shall mean software programs prepared, held, or existing for general or repeated use, including software programs developed in-house and subsequently held or offered for sale or lease. Canned computer software includes all software, except custom software programming, regardless of its function and regardless of whether it is transferred to the purchaser in physical form, via telephone lines, or by another alternative form of transmission.
- (4) Canned computer software is tangible personal property; and, on and after March 1, 1997, the retail sale or rental of canned computer software is subject to the sales, use, or rental tax, whether such transaction was affected by a transfer of title, or of possession of both, or a license to use or consume. Unless specifically stated otherwise, the licensing of canned computer software is considered a retail sale, and not rental, and is subject to sales or use tax. The measure of tax upon which the sales, use, or rental tax is to be computed is the total amount received from the sale or rental of canned computer software to the customer. Wal-Mart Stores, Inc. v. City of Mobile and County of Mobile, Alabama Supreme Court, decided September 13, 1996, substitute opinion released November 27, 1996.
- (5) The term “custom software programming” as used in this regulation shall mean software programs created specifically for one user and prepared to the special order of that user. The term “custom software programming” also includes programs that contain pre-existing routines, utilities, or other program components that are integrated in a unique way to the specifications of a specific purchaser. Custom software programming also includes those services represented by separately stated charges for modifications to a canned computer software program when such modifications are prepared to the special order of the customer. Modification to a canned computer software program to meet the customer's needs in custom software programming only to the extent of the modification. Custom software programming is not subject to tax regardless of the manner or medium of transfer to the customer since the charge for the custom software programming is a charge for professional services and the manner or medium of transfer is considered incidental to the sale of the service.
- (6) The provider of custom software programming would owe sales and/or use tax on the cost of the tangible medium for transferring the custom software programming to the customer. Such tangible mediums would include tapes, cards, discs, compact discs, and any other tangible personal property used in transferring custom software programming to the customer.
- (7) The term “software maintenance agreement/contract” as used in this regulation shall mean contracts sold in connection with the sale or rental of canned software and can include any, all, or a combination of the following: technical consultation (support) services either by telephone or on-site visits, corrections of errors or malfunctions (bugs) in the canned software, provisions for enhancements (software upgrades) to the canned software, revisions to operating manuals for the canned software, and training services. If the maintenance contract is required as a condition of the sale or rental of canned software, the gross sales price or gross rental price is subject to tax whether or not the charge for the maintenance contract is separately stated from the charge for the canned software. If the maintenance contract is optional to the purchaser of the canned software, then only the portion of the contract fee representing enhancements or upgrades and new operating manuals is subject to tax provided the fees for consultation or support services, error corrections, and training services are separately stated and such separate statement is not used as a means of avoiding imposition of tax upon the actual gross receipts from the furnishing of upgrades or manuals. If these fees are not separately stated, the entire charge for the maintenance contract is subject to tax. If the maintenance contract is optional to the lessee of the canned software, the rental tax will not apply to the gross receipts derived therefrom.
- (8) Maintenance contracts sold in connection with custom software programming, whether required or optional, or whether or not separately stated, are not subject to tax. The provider of the custom software programming is the consumer of any tangible personal property used in producing operating manuals and would owe sales or use tax on the cost of these items.

**Author:** Donna Joyner

810-6-1-.37. Computer Hardware And Software., AL ADC 810-6-1-.37



# Alabama – continued – 2020 Administrative Rule

## AL ADC 810-6-1-.37 Computer Hardware And Software

(1) Computers and related equipment, also known as computer hardware, consist of components and accessories that make up the physical computer assembly. The retail sale of computer hardware is subject to Sales Tax or Use Tax. The rental of computer hardware is subject to Rental Tax.

(2) The term "computer software" is defined as: (a) A sequence of automatic data-processing equipment instructions necessary to solve a problem, and includes both system and application programs and subdivisions, such as assemblers, compilers, routines, generators and utilities. (b) Software programs prepared, held, or existing for general or repeated use, including software programs developed in-house and subsequently held or offered for sale or lease.

(3) The term "licensure" includes the rental or leasing of computer software.

(4) Computer software is tangible personal property. The retail sale or licensure of computer software is subject to Sales Tax, Use Tax, or Rental Tax, *whether the transaction is effected by a transfer of title, possession, or a license to use or consume. Unless specifically stated otherwise, the licensing of computer software is considered a retail sale, and not a rental, and is subject to Sales Tax or Use Tax regardless of its function or form of transmission to the purchaser or licensee.* Sales Tax, Use Tax, or Rental Tax is computed on the total amount received from the sale or licensure of computer software to the customer.

(5) The term "software programming" includes services for the development and modification of software applications specific to the needs of the customer. It does not include any software sold or licensed to the customer as part of the development or modification. *The cost of the software programming should be represented by separately stated on the invoice to the customer apart from the cost of the purchased or licensed software. When separately stated, the software programming is not subject to tax regardless of the manner or medium of transfer to the customer since the charge for the software programming is a separately stated charge for professional services.* The manner or medium of transfer is considered incidental to the sale of the service.

(6) The provider of software programming owes Sales Tax or Use Tax on the cost of the tangible medium for transferring the software programming to the customer. Tangible mediums includes any tangible personal property used in transferring software programming to the customer. (7) The term "software maintenance agreement/contract" means contracts sold in connection with the sale or licensure of software and includes any, all, or a combination of the following: technical consultation (support) services, corrections of errors or malfunctions (bugs) in the software, provisions for enhancements (software upgrades) to the software, revisions to operating manuals for the software, and training services. If the maintenance contract is required as a condition of the sale or licensure of software, the gross sales price or gross rental price is subject to tax whether the charge for the maintenance contract is separately stated from the charge for the software. If the maintenance contract is optional to the purchaser of the software, then the portion of the contract fee representing enhancements or upgrades and new operating manuals is subject to tax. The fees for consultation or support services, error corrections, and training services that are separately stated are not subject to tax, provided that a separate statement is not used as a means of avoiding imposition of tax upon the actual gross receipts from the furnishing of upgrades or manuals. If these fees are not separately stated, the entire charge for the maintenance contract is subject to Sales Tax, Use Tax, or Rental Tax.

(8) Maintenance contracts sold in connection with software programming, whether required or optional, are not subject to Sales Tax, Use Tax, or Rental Tax. The provider of the software programming is the consumer of any tangible personal property used in producing operating manuals and owes Sales Tax or Use Tax on the cost of these items.

(9) This rule shall be applied prospectively from its effective date.





**(Tax Authority wins, digital automated services - no “human effort”)**

- **Washington imposes a business and occupation (B&O) tax on both digital goods and digital automated services (DAS).**
- **The administrative rule distinguished a digital good from DAS as follows:**
  - “A digital good is not a service involving one more software applications. A digital good consists *solely of images, sounds, data, facts, information or any combination thereof*. Clear examples of digital goods are digital books, digital music, digital video files, and raw data.” WA ADC 458-20-15503(203)(a)(i). In contrast, digital automated services consist of software that facilitates access to a stand-alone digital good. *Id.*
- **Gartner argued that Washington incorrectly classified its services as DAS and not professional services.**
  - The Court of Appeals disagreed.
  - The Court found that Gartner’s clients purchased access to digital goods that was enhanced by a customized client portal - which is an automated feature.
- **The Court also found that Gartner’s “services” did not involve “human effort.”**





- When a Citrix customer purchases a subscription for access to an online product, the customer gains access to a remote network of Citrix's servers running proprietary software, which is necessary for Citrix's products to function.
  - Citrix's subscription fees involved “transfers of rights to use software installed on a remote server.” 830 Code Mass. Regs. § 64H.1.3(3)(a).
- The tax authority correctly found that in the tax preparation example and in Citrix's sales of subscriptions to the online products,
  - “it is the functionality of standardized software that customers seek and that enables them to complete specific tasks.”
  - The basic purpose of the transaction was acquiring access to and use of the online products.



# Discussion Points

Alabama	Russell case, new administrative rule, no statute re: digital goods – deemed taxable?
Arkansas	The term computer software does not include software delivered electronically; '17 = tax “specified digital goods”
Colorado	CO does not have statute but still taxes digital products, similar to Arizona. Ball Aerospace suggests taxation of e-delivered software- and statute (?)
Florida	Video – taxed communication services
Idaho	Software = dig. product, permanent use only (what it means)
Indiana	Change in 06/2018
Kentucky	Multichannel programming SaaS
Louisiana	SaaS – moving to no tax (?); basis for taxing digital goods - Bulletin No. 11-005 (DG- only if downloaded?) See Cox.
Nebraska	Unique, “furnishing software” – does it cover SaaS, digital goods – only if downloaded (?)
New Jersey	Digital products delivered not accessed (?)
Ohio	SaaS - ?
South Carolina	SaaS – APS
Virginia	Communications covers streaming

